



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

[REDACTED]
Joanna V.,¹
Complainant,

v.

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

Appeal No. 0120162570

Hearing No. 550-2012-00359X

Agency No. 4F-940-0023-12

DECISION

The Equal Employment Opportunity Commission (EEOC or Commission) accepts Complainant's appeal from the July 8, 2016 final agency decision (FAD) 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. 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** the FAD.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a City Carrier, CC-01, at the Agency's Main Post Office in Sunnyvale, California. Complainant alleged that she had been subjected to sexual harassment by a co-worker (CW-1) since sometime in 2010. Among the incidents, Complainant alleged that CW-1 visited her on her route and tried to help her; washed her Postal vehicle; followed her home and to work while disguised in a hood; sent her inappropriate text messages; moved to her neighborhood; gave gifts to her daughter; left

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.

messages in her hamper about her birthday; left messages indicating that he knew both license plates of her cars; and left messages at her case. Complainant claimed that she reported the conduct to the police and had the Union Steward tell CW-1 to stay away from her and to move out of the complex within 10 days.

On December 20, 2011, Complainant reported that she was being subjected to sexual harassment to the Postmaster. Among other things, Complainant told the Postmaster that CW-1 had sent her text messages stating such things as "You are the reason I can't sleep at night" and Bible quotes. Complainant further reported that CW-1 came onto her route and washed her Postal vehicle twice. Complainant stated that she reported CW-1's conduct to the police. The Postmaster initiated an investigation into the allegations, instructed CW-1 to stay away from Complainant both at and off work, and that any further issues would result in disciplinary action.

On December 28, 2011, Complainant claimed that she found a red envelope with \$30.00 in it with "friends forever" on the envelope. On another occasion, Complainant alleged that she saw CW-1 staring at her with his hand on his hip while she loaded her vehicle. On the night of January 6, 2012, Complainant claimed that she saw a man pass by her garage door with his face covered. Complainant alleged that as soon as she closed the garage, she heard someone bang on her garage door and yell "you fucking bitch" which prompted her to call the police. Complainant believed that CW-1 was the man with his face covered and who banged on her garage. Complainant claimed that CW-1 stalked her near her home on January 20, 2012. Complainant alleged that she called the police, but was told that there was nothing they could do unless she had a restraining order. Complainant reported the incident to management on January 30, 2012.

On February 1, 2012, Complainant reported to her supervisor (S1) that CW-1 was stalking her and submitted medical documentation indicating that she was temporarily totally disabled due to a mental condition as a result of CW-1's alleged sexual harassment. After receiving the report of CW-1's alleged conduct, the Postmaster placed CW-1 on Emergency Placement in an Off-Duty Status/Without Pay. On February 3, 2012, CW-1's alleged conduct was reported to the U.S. Postal Inspection Service (USPIS). During an investigation, USPIS interviewed witnesses and reviewed police reports. Complainant did not participate in the investigation. On February 27, 2012, USPIS submitted its Investigative Memorandum and Exhibits to the Postmaster for his consideration as to whether disciplinary action was warranted.

Following receipt of the investigation, the Postmaster concluded that there were discrepancies in Complainant's allegations. For example, the Postmaster determined that despite Complainant's claim that she called the police on January 20, 2012, there was no evidence that a call to the San Francisco Police Department was recorded. In addition, evidence indicated that CW-1 was in Sacramento at the time Complainant alleged that he stalked her. Further, CW-1 admitted during the investigation that he made unauthorized deviations from his route to assist Complainant and washed her Postal vehicle, but stated that he did so for two other carriers as well. Further, the Postmaster found other inconsistencies between what Complainant told management officials about certain incidents and what she told police. The Postmaster concluded that there was

insufficient evidence that CW-1 had any contact with Complainant after being placed on notice to stay away from her on December 20, 2011, and he was returned to work on February 29, 2012. Nonetheless, on March 29, 2012, the Postmaster issued CW-1 a 14-Day No Time-Off Suspension for unacceptable conduct for deviating from his route to assist other carriers and washing their Postal vehicles without approval from his supervisor.

On April 12, 2012, Complainant filed a formal complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of race (Hispanic), national origin (Mexico), sex (female), and disability when, beginning February 6, 2011 and continuing, Complainant was sexually harassed by a co-worker (CW-1) and management failed to take action to remove her from harm.

After an 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). Complainant timely requested a hearing; however, the AJ assigned to the matter dismissed the hearing request after Complainant failed to appear for the scheduled hearing. The AJ remanded the complaint to the Agency, and the Agency issued a FAD pursuant to 29 C.F.R. § 1614.110(b).

In the FAD, the Agency determined that Complainant failed to show that she had been subjected to sexual harassment. The Agency found that Complainant reported in December 2011, that CW-1 subjected her to numerous instances of sexual harassment dating back to 2010. Management conducted two separate investigations upon receiving Complainant's report of harassment. The Agency determined that only two of Complainant's allegations were substantiated: CW-1 acknowledged that he deviated from his route to provide Complainant assistance and CW-1 acknowledged washing Complainant's and other carriers' Postal vehicles. The Agency concluded that the evidence demonstrated that these were isolated and insufficiently severe or pervasive to establish a hostile work environment. Further, the Agency found that Complainant failed to show that the incidents alleged were based on her protected classes. As a result, the Agency found that Complainant had not been subjected to sexual harassment or a discriminatory hostile work environment as alleged.

The Agency determined that even assuming that the conduct at issue rose to the level of sexual harassment or a discriminatory hostile work environment, there was no basis to impute liability. The Agency found that the record revealed that as soon as Complainant reported her allegations to management, investigations were initiated by the Postmaster and USPIS and CW-1 was instructed to stay away from Complainant. Following the investigation, CW-1 was disciplined for his conduct. As a result, the Agency concluded that management took prompt and appropriate corrective action. Accordingly, the Agency found that Complainant's hostile work environment claim failed. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Agency failed to analyze the pattern aspect and totality of the circumstances of her hostile work environment claim. Complainant argues that the Agency's actions demonstrated a lack of concern for health and safety. Complainant contends that the AJ erred in dismissing her hearing request because she was not medically able to proceed with the hearing. Complainant claims that she submitted medical documentation showing that she was experiencing complications from a condition that was causing her to have difficulty breathing and concentrating. Further, Complainant challenges the AJ's assertion that she was attempting to avoid the hearing. Accordingly, Complainant requests that the Commission reverse the FAD and remand the matter back for a hearing.

ANALYSIS AND FINDINGS

The AJ's Dismissal of Complainant's Hearing Request

As an initial matter, the Commission will first address Complainant's contentions on appeal regarding the AJ's dismissal of her hearing request as a sanction for failure to appear for the hearing. The Commission notes that Commission regulations and precedent provide AJs with broad discretion in matters relating to the conduct of a hearing, including the authority to sanction a party for failure, without good cause shown, to fully comply with an order. *See* 29 C.F.R. § 1614.109(e); Equal Employment Opportunity Commission Management Directive 110 for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 7 (Aug. 5, 2015). However, such sanctions must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. A sanction may be used to both deter the non-complying party from similar conduct in the future, as well as to equitably remedy the opposing party.

Here, the record shows that on May 18, 2016, Complainant's representative informed the AJ that Complainant had become ill and would not be able to appear for the hearing the next day. Complainant's representative motioned for the hearing to be postponed. In support, Complainant's representative submitted a note stating that "[Complainant] was seen and evaluated today. Please excuse her from the hearing on Thursday 5/19/16 and Friday 5/20/16...[Complainant] may return to work on 5/23/16." The AJ denied the motion to postpone and warned Complainant's representative that if Complainant was not fully prepared or failed to appear at the hearing the next day, it would constitute sanctionable conduct resulting in the complaint being remanded to the Agency for a FAD. Complainant did not appear at the hearing on May 20, 2016, and the AJ sanctioned Complainant by remanding the complaint to the Agency for a FAD. The AJ noted in her order that Complainant's submitted medical note did not cite any specific medical condition and indicated without explanation that she would be recovered from her unspecified illness as soon as the scheduled hearing was scheduled to end. The AJ further noted that Complainant and her representative had attempted on several other occasions to either delay or change the hearing venue based on highly dubious and shifting reasons. The AJ listed the numerous requests by Complainant and her representative and found them to be pretextual attempts to "game" the hearing process. The AJ added that Complainant's

representative had a history of engaging in similar conduct which was extremely detrimental to complainants and the EEO process. Therefore, the AJ not only sanctioned Complainant by remanding the complaint to the Agency for a FAD, but recommended that Complainant's representative be permanently disqualified from any future representation before the Commission's San Francisco District Office.

The Commission finds that Complainant's arguments on appeal are insufficient to find that the AJ abused her discretion in remanding the matter to the Agency for a decision on the merits of the complaint. The record is clear that Complainant was notified through her attorney of the date, time, and location of the hearing and the possibilities of sanctions for failure to appear for the hearing. Complainant's submitted medical documentation is insufficient to show that Complainant was so incapacitated that she could not have appeared for scheduled hearing. Thus, the Commission finds that the AJ did not abuse her discretion by dismissing Complainant's hearing request given Complainant's failure to appear for the hearing.

Hostile Work Environment – Sexual and Sex-Based Harassment

To establish a claim of sexual harassment, Complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to unwelcome conduct related to her sex, including sexual advances, requests for favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based on sex; (4) the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer, in other words, did the agency know or have reason to know of the sexual harassment and fail to take prompt, remedial action. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the complainant's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (Mar. 8, 1994).

Here, several of Complainant's allegations are corroborated by the record. The record contains text messages CW-1 sent Complainant from October through November 2011. ROI, at 49-59, 320-24. While some of the messages appear to be friendly in nature, at least one of the messages was an invitation to go to dinner and others for coffee. Complainant stated that she declined CW-1's offers. Further, CW-1 stated that he stopped sending Complainant text messages around November 24, 2011, because she stopped responding and he thought that he had angered her. ROI, at 377. Additionally, the record reveals that CW-1 began showing up on Complainant's route to provide her unsolicited assistance and washed her Postal vehicle. Complainant reported to the Postmaster that CW-1 was harassing her on December 20, 2011. Id. at 362. The Postmaster initiated an investigation into the matter and instructed CW-1 to stay away from Complainant. Id. at 364. Additionally, the Postmaster notified USPIS. Id.

Several other incidents were not corroborated or were later contradicted. On one occasion, Complainant reported that CW-1 parked his Postal vehicle next to hers; however, it was later

determined that they both had parked outside their assigned spaces. ROI, at 342. On January 6, 2012, Complainant claimed that she saw someone wearing a hooded sweatshirt near her home as she pulled into her driveway and later someone banged on her garage door and yelled “you fucking bitch;” however, Complainant could not conclusively identify CW-1 as the individual responsible. Complainant filed a police report regarding the incident. On January 20, 2012, Complainant alleged that she observed a white Toyota car driven by CW-1 in the court where she lived; however, it was determined during the investigation that CW-1 was performing work for his second job with Hertz Rent-a-Car transporting cars to Sacramento at the time. *Id.* at 411. Nonetheless, once Complainant reported this stalking allegation, CW-1 was placed on Emergency Placement in an Off-Duty Status/Without Pay. *Id.* at 510.

The Commission does not have the benefit of an Administrative Judge’s credibility determinations after a hearing. Therefore, the Commission can only evaluate the facts based on the weight of the evidence presented. The record is clear that CW-1 sent Complainant unwanted text messages, met her on her route to provide unsolicited assistance, and washed her Postal vehicle without permission. Complainant has presented no corroborating evidence that many of the other incidents occurred as alleged. Nonetheless, even assuming that the conduct occurred as alleged, the Commission finds that Agency management took prompt and effective action upon Complainant’s report of sexual harassment. The Postmaster initiated an investigation, instructed CW-1 to stay away from Complainant, and notified USPIS, who initiated their own investigation as well. When Complainant alleged that further contact occurred, the Postmaster placed CW-1 on Emergency Placement in an Off-Duty Status. Both investigations concluded that there was no evidence supporting Complainant’s claim that CW-1 had any contact following the December 20, 2011 instruction to stay away from her. CW-1 was, however, disciplined with a 14-Day Suspension for deviating from his route, washing Postal vehicles, and making unwelcome visits to another carrier’s route. As such, the Commission finds that Complainant failed to establish that the Agency should be held liable for CW-1’s conduct. Complainant’s claim that she was subjected to sexual harassment fails.

Hostile Work Environment – Non-Sexual Harassment

To establish a claim of harassment a complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant’s] employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Therefore, to prove her harassment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a “reasonable person” in Complainant’s position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of her protected classes. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself.

Here, Complainant asserted that based on her protected classes of race, national origin, and disability, she was subjected to a hostile work environment by CW-1 and by management who failed to take action. Even assuming that the alleged conduct was sufficiently severe or pervasive to create a hostile work environment, Complainant failed to show that the Agency’s actions were based on discriminatory animus. As discussed above, management officials initiated two investigations into Complainant’s allegations immediately after she reported them. In addition, the Postmaster ordered CW-1 to stay away from Complainant at and outside of work. The investigations ultimately concluded that there was insufficient evidence establishing that any further conduct occurred after CW-1 was instructed to avoid contact. Nonetheless, CW-1 was disciplined with a 14-day suspension for deviating from his route and washing Complainant’s and other carriers’ Postal vehicles without permission. Thus, the Commission finds that Complainant failed to demonstrate that she was subjected to a hostile work environment as alleged.

CONCLUSION

After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Equal Employment Opportunity Commission to AFFIRM the Agency’s final decision because the preponderance of the evidence of record does not establish that discrimination occurred.

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 (S0610)

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. 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

August 15, 2018

Date