



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

[REDACTED]
Heath P.,¹
Complainant,

v.

Richard V. Spencer,
Secretary,
Department of the Navy,
Agency.

Appeal No. 0120162808

Hearing No. 551 -2015-00061X

Agency No. DON-14-4523A-1590

DECISION

The Equal Employment Opportunity Commission (EEOC or Commission) accepts Complainant's appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 9, 2016 final order 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 final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Helper Trainee (Marine Machinery Mechanic), WG-5334-01, at the Agency's Puget Sound Naval Shipyard and Intermediate Maintenance Facility Shop 38 in Bremerton, Washington. Complainant participated in a vanpool to commute to and from work which was operated by Pierce County Transit. The other riders were Agency employees; however, they worked in different shops or offices than Complainant.

While training, Complainant was placed on several different crews with different supervisors. The supervisors submitted informal evaluations ("yellow sheets") regarding Complainant and other employees to Complainant's second-level supervisor (S2). The supervisors reported that

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.

Complainant's work performance needed improvement. On February 5, 2014, S2 sought feedback from supervisors about Complainant's long-term fit in preparation for evaluating him during his probationary period. S2 mostly received negative feedback. On February 6, 2014, S2 emailed Human Resources about the process for removing Complainant. On February 7, 2014, S2 decided to reassign Complainant to a different crew to give him another chance.

In February 2014, Complainant claimed that several passengers in his vanpool had made derogatory comments about homosexuals including "faggot" and "go eat a big dick," which he found offensive. Complainant alleged that he put up with it for a while, but eventually told the passengers that he did not want them to use that language anymore. Complainant then turned to an African-American passenger (P1) and asked him if he would be offended if Complainant called him a "nigger." P1 stated that he would be very offended and subsequently filed an EEO complaint about Complainant's conduct.

On February 25, 2014, S2 learned of P1's EEO complaint and called Complainant in to meet with him about the incident. Complainant informed S2 that he felt harassed as well based on the language used by some of the other passengers. S2 informed Complainant that he could meet with an EEO Counselor if he wished and sent an email to the Agency's EEO Office at Complainant's request. Approximately 30 minutes later, S2 sent an email requesting to begin the process of removing Complainant from employment due to his work performance. S2 began compiling documentation in support of his recommendation to terminate Complainant and submitted it to Human Resources.

Following Complainant's EEO Counselor contact, the Agency initiated an investigation (1561) into Complainant's allegations regarding the vanpool passengers. The 1561 investigator interviewed witnesses and reviewed documentation related to P1's EEO complaint. On March 14, 2014, the 1561 investigator submitted an investigative report which concluded that it was commonplace for vanpool passengers, including Complainant, to use inappropriate language, but that there was no supporting evidence establishing that homosexual slurs were directed at Complainant personally or that Complainant was subjected to sexual harassment. The investigative report concluded, however, that Complainant had engaged in several incidents of inappropriate and/or intimidating conduct toward other vanpool passengers. The 1561 investigator recommended that Complainant's continued employment should be reviewed by his supervisors, that Complainant be removed from the vanpool if he remained employed, and that vanpool passengers be briefed on the expectation that the Agency's rules of conduct apply when using the vanpool.

The Production Workforce Manager (M1) received S2's recommendation for termination and the investigative report from Human Resources. M1 did not receive, however, the packet of information supporting S2's recommendation that S2 had submitted. Based on the information contained in the 1561 investigation and S2's recommendation for termination, M1 decided to terminate Complainant. On March 21, 2014, M1 issued Complainant a Notification of Termination of Appointment terminating Complainant's employment during his probationary period.

On June 2, 2014, Complainant filed a formal complaint alleging that the Agency discriminated against him on the bases of sex (male) when he was subjected to sexual harassment in a vanpool from September 2013 through March 21, 2014. In addition, Complainant alleged that he was subjected to reprisal for prior protected EEO activity when his employment was terminated on March 21, 2014, during his probationary period.

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 requested a hearing. Prior to the hearing, the AJ notified the parties that she would be issuing summary judgment in favor of the Agency as to Complainant's hostile work environment claim. The AJ held a hearing on January 26, 2016 regarding Complainant's removal claim, and issued a decision addressing all claims on March 17, 2016.

In the decision, with respect to his hostile work environment claim, the AJ determined that the alleged conduct at issue was insufficiently severe or pervasive. The evidence showed that passengers in the vanpool used the word "fag" on several occasions; however, the AJ noted that there was no evidence that the slur was directed at Complainant or that any of the passengers were even aware of Complainant's sexual orientation. Additionally, the AJ found that the evidence showed that Complainant engaged in some off-color jokes and language himself. The AJ added that when Complainant complained to his fellow riders, they did not use the offensive word again. Even assuming that the conduct was sufficiently severe or pervasive, the AJ found that the conduct at issue occurred outside of work hours in a voluntary vanpool arranged by a third party. Thus, the AJ concluded that there was no basis to impute liability to the Agency. Accordingly, the AJ found that Complainant had not been subjected to a hostile work environment as alleged.

Next, as to his removal, the AJ determined that the Agency had articulated legitimate, nondiscriminatory reasons for its actions. S2 testified that he recommended Complainant's termination solely for conduct issues while at work. S2 cited the problems that Complainant's supervisors raised about him, including that he had a difficult time getting along with his co-workers and that his co-workers preferred not to be paired up with him. M1, the deciding official, testified that Complainant's conduct outside of work toward Agency employees was his justification for terminating Complainant. Specifically, M1 pointed to Complainant's racist and sexist language along with comments he made about guns which caused his fellow passengers to feel uncomfortable and/or frightened.

S2 testified that he began the process of evaluating Complainant for termination during his probationary period because he received "yellow sheet" evaluations that stated Complainant's performance needed improvement. The AJ noted that there was testimony that Complainant had issues with motivation and with remaining focused on the task at hand while working on the ships. Ultimately, S2 initiated the termination process based on performance and conduct issues on the ship. M1, the deciding official, was unaware of the performance and conduct issues on

the ship and made the determination solely on information contained in the investigation into the vanpool incident. The AJ determined that there was no direct communication between S2 and M1 and the packet of information that S2 prepared for M1 (which was provided to Human Resources) was never given to M1.

In attempting to establish that the Agency's reasons for its actions are pretextual, Complainant asserted he was retaliated against based on the proximity in time between S2 scheduling his EEO appointment and when he sent the email stating that the Agency must move forward with Complainant's termination. The discussion between Complainant and S2 that led to the EEO appointment was the first time that Complainant disclosed his sexual orientation to S2. The time between Complainant's request for EEO contact and when S2 sent the email requesting Complainant's termination was approximately 30 minutes. Further, Complainant established that S1 documented in writing that Complainant was making progress under his supervision. S2 testified that he changed his mind after speaking with S1 regarding S1's concerns about Complainant. S1 testified that he did not recall having any conversations with S2 about Complainant. Thus, the AJ found that there was no evidence to support S2's reasons for deciding to terminate Complainant approximately 30 minutes after he made the EEO appointment for Complainant and after he learned of Complainant's sexual orientation.

The AJ noted that M1 made the ultimate decision to terminate Complainant, and he had no knowledge of Complainant's EEO activity. Accordingly, the AJ found that M1 made the termination decision solely upon legitimate, nondiscriminatory factors. However, the AJ concluded that the termination recommendation would not have been presented to M1 were it not for S2's actions which were based, in part, on reprisal and sex/sexual orientation. As a result, the AJ found that Complainant had established that the Agency's reasons for its actions were pretext for unlawful discrimination and reprisal.

Next, the AJ determined that the Agency proved that it would have terminated Complainant for legitimate, nondiscriminatory reasons even absent discrimination or reprisal. Specifically, M1 determined that Complainant should be terminated solely on the investigation into the vanpool incidents. The investigative report contained statements from Agency employees who stated that Complainant made them feel extremely uncomfortable when he used racist and sexist language repeatedly and when he displayed anger while driving in such a way as to make some of the passengers feel physically unsafe. In particular, one African-American passenger claimed that Complainant referred to him as "nigger" more than once in a way that the passenger felt Complainant was trying to goad him into a fight. Another passenger, who is of Asian descent, stated that he was confused by Complainant's use of the phrase "zipper head" until he looked it up on the internet and learned it was a derogatory term used during the Korean War referring to Korean troops. M1 testified that he did not want to invest in a career for an employee who treated others in this manner and thus believed he was completely justified in terminating Complainant during his probationary period.

The AJ concluded that the Agency established that it would have terminated Complainant even despite the discrimination and reprisal; therefore, the damages to which Complainant was

entitled are limited. The AJ found that Complainant was entitled to declaratory and injunctive relief, but not personal relief or reinstatement. The AJ ordered the Agency to pay Complainant any attorney's fees and costs he incurred in connection with this complaint. Further, the AJ ordered the Agency to provide a neutral reference for Complainant should any potential employer contact the Agency as an employment reference. Finally, the AJ ordered the Agency to conduct EEO training for management officials and employees at the Puget Sound Naval Shipyard and Intermediate Maintenance Facility Shop 38 and to post a notice.

The Agency subsequently issued a final order fully implementing the AJ's decision. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant disputes that the Agency proved that it would have terminated him absent discriminatory or retaliatory motives. Complainant argues that the AJ erred in finding that most of the feedback about his work performance was largely negative. Complainant contends that the AJ erred by allowing testimony about the vanpool activity after disallowing testimony from an individual from Pierce County Transit. Complainant states that the AJ failed to apply the law correctly when she gave authority to the Agency over the alleged vanpool activity. Accordingly, Complainant requests that the Commission reverse the final order.

In response, the Agency contends that the AJ's factual findings are supported by substantial evidence and the AJ correctly found that it provided legitimate, nondiscriminatory reasons to terminate Complainant. The Agency contends that the AJ correctly found that Complainant proved that S2's reasons for his actions were pretextual and that the deciding official, M1, did not rely on any information provided by S2 and instead relied on information from the investigation into Complainant's behavior on the vanpool. The Agency argues that the AJ correctly found that the Agency would have terminated Complainant absent the discriminatory reason and that Complainant was only entitled to declaratory and injunctive relief. Accordingly, the Agency requests that the Commission affirm its final order.

ANALYSIS AND FINDINGS

The Commission shall first address Complainant's contentions on appeal regarding the manner in which the AJ conducted the hearing phase. Complainant alleges that the AJ committed several errors including disallowing a non-Federal employee from testifying and allowing testimony from Agency employees about incidents that occurred in the vanpool. The Commission notes that AJs have broad discretion in the conduct of hearings, including discovery and the determination of whether to admit evidence, or permit or compel the testimony of witnesses. See 29 C.F.R. § 1614.109(e); EEOC Management Directive 110 for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 7 (Aug. 5, 2015). The Commission has reviewed the record and finds no abuse of discretion by the AJ. Further, the Commission is unable to find any evidence of bias, or other reversible error, resulting from the manner in which the AJ managed this case.

The AJ's Summary Judgment Decision

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. The Commission finds that the AJ properly issued summary judgment as to Complainant's hostile work environment claim as the material facts are undisputed.

Hostile Work Environment – Sexual Orientation-Based

To establish a claim of harassment a complainant must show that: (1) he belongs to a statutorily protected class; (2) he 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 his 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 his harassment claim, Complainant must establish that he 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 his protected class. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself.

The Commission notes that the Commission has jurisdiction over Complainant's sexual orientation discrimination claim pursuant to the Commission's finding in Baldwin v. Dep't of Transp., which held that a claim of sexual orientation discrimination is a claim of sex discrimination, and therefore covered under Title VII and properly processed under the 29 C.F.R. Part 1614 process for EEO complaints. Baldwin v. Dep't of Transp., EEOC Appeal No. 0120133080 (July 15, 2015).

Here, Complainant alleged that he was subjected to sexual orientation-based harassment as evidenced by several Agency employees' use of offensive language and slurs in the vanpool. Several vanpool passengers admitted using offensive language and slurs, but noted that Complainant engaged in offensive conduct and used slurs as well. Additionally, vanpool passengers denied any knowledge of Complainant's sexual orientation or directing the slurs at him to harass him. P1 stated that Complainant commented on a female passenger's breasts and made racist comments to other passengers. ROI, at 534. The female passenger corroborated that Complainant made several sexual comments about her body and other passengers substantiated

Complainant's use of slurs. Id. at 542, 559. Further, P1 affirmed that when Complainant complained about passengers' use of the word "faggot," he turned to P1 and asked, "what if I called you a nigger?" Id. at 535. Passengers confirmed that no one used the term or engaged in similar conduct following Complainant's request that they stop using the offensive language. Id. at 537, 544.

The Agency conducted an investigation into Complainant's allegations which concluded that the vanpool members all made inappropriate comments and jokes, including Complainant. ROI, at 155. The investigation disclosed that Complainant made several derogatory and sexual comments about a female passenger, made racist comments and acted as if he did not want minorities sitting next to him, frequently discussed guns and once brought a gun from his car to show the other passengers, and made disturbing comments such as if he got fired he "wouldn't go down without a fight and would take everyone with [him.]" The investigator further recommended that Complainant's conduct be reviewed by his supervisors and a determination made as to whether his employment would continue and that Complainant be removed from the vanpool if he remained employed. Id. at 158.

The Commission notes that the words "fag" and "faggot" have been historically used in the United States as a highly offensive, insulting, and degrading sex-based epithet against gay men. Additionally, the words "fag" and "faggot" are offensive, insulting, and degrading sex-based epithets historically used when a person is displaying their belief that a male is not as masculine or as manly as they are. See, e.g., Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 870, 875 (9th Cir. 2001) (concluding that verbal abuse, including the use of the epithet "faggot," occurred because of sex).

The Commission takes notice that the Agency did not operate or control the vanpool and that it was solely operated and administered by Pierce County Transit. Nonetheless, assuming that the vanpool conduct at issue was sufficiently severe and pervasive to rise to the level of a hostile work environment, the Commission finds that Complainant failed to show that his co-workers' actions were motivated by discriminatory animus toward his protected class. The vanpool passengers all affirmed that they were not aware of Complainant's sexual orientation, and did not direct the offensive language at Complainant directly. Nonetheless, the record shows that Agency officials promptly initiated an investigation into the vanpool behavior after Complainant reported it. The investigation determined that all of the vanpool passengers engaged in offensive conduct, including Complainant. The investigator recommended that all of the vanpool passengers be briefed on the expectations of conduct. There is no evidence that any of the offensive conduct at issue recurred following Complainant's request that the passengers stop using the offensive slur and Complainant's report of the vanpool conduct to management. Based on the circumstances present, the Commission agrees with the AJ and finds no persuasive reason to hold the Agency liable for the conduct of the vanpool passengers.

The AJ's Decision After a Hearing

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ’s conclusions of law are subject to a de novo standard of review, whether or not a hearing was held. See 29 C.F.R. § 1614.405(a).

An AJ’s credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Ch. 9, at § VI.B. (Aug. 5, 2015).

Disparate Treatment

With regard to Complainant’s termination, the Commission notes that 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. To establish a prima facie case of reprisal, Complainant must show that (1) he engaged in protected EEO activity; (2) the Agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the Agency; and (4) a nexus exists between his protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). 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, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

The Commission further notes that under the “cat’s paw” theory, animus and responsibility for an adverse action can be attributed to a supervisor who was not the ultimate decision maker, if that supervisor intended the adverse action to be a consequence of her discriminatory conduct. See Feder v. Dep't of Justice, EEOC Appeal No. 0720110014 (July 19, 2012) (appropriate, under “cat’s paw” theory, to impute manager’s retaliatory animus to deciding official where manager wielded sufficient informal power to influence deciding official and deciding official acted as conduit for manager’s retaliatory animus related to complainant’s reasonable accommodation); cf. Staub v. Proctor Hosp., 562 U.S. 411 (2011) (employer liable, under Uniformed Services

Employment and Reemployment Rights Act, for discriminatory animus of supervisor who did not make the ultimate employment decision where supervisor performs an act motivated by discriminatory animus that is intended to cause an adverse employment action and the act is the proximate cause of the ultimate employment action).

Upon review, the Commission finds substantial evidence supports the AJ's decision. Assuming *arguendo* that Complainant established a *prima facie* case of reprisal, substantial record evidence shows that Agency officials articulated legitimate, nondiscriminatory reasons for their actions. Specifically, S2 testified that he received a "yellow sheet" from a supervisor indicating that Complainant needed improvement. Hr'g Tr., at 67. S2 solicited further feedback from other supervisors who had supervised Complainant. *Id.* at 69. Several supervisors responded with some positive comments, but several supervisors believed that Complainant would not be a good long-term fit. ROI, at 237-38, 242, 247, 252. S2 had initially taken steps to begin the termination process, but ultimately decided to reassign Complainant to another crew to give him another chance. Hr'g 73-74. M1 testified that a few weeks later, after receiving feedback from S1, S2 decided to propose Complainant's termination based on Complainant's continued performance issues. *Id.* at 76-77. The Shop 38 Superintendent testified that he concurred in S2's proposal to terminate Complainant based on his performance. *Id.* at 112-15. S2 compiled documentation in support of the termination decision and forwarded it to Human Resources. *Id.* at 81.

The deciding official, M1, testified that he received information from Human Resources, including S2's termination recommendation and the 1561 vanpool investigative materials, and decided to terminate Complainant. Hr'g 126, 131-32. M1 testified that he reviewed the statements of the vanpool passengers indicating that Complainant used racist and sexist language, that they felt very uncomfortable with Complainant in the vanpool, and other threatening or intimidating actions. *Id.* at 132. M1 testified that, considering that Complainant was a probationary employee who engaged in that type of conduct, he did not want to invest in someone who treated co-workers like that. *Id.* at 134. M1 testified that the findings of the 1561 investigation and statements from employees corroborating the vanpool incidents were the only information he relied on in reaching his decision to terminate Complainant. *Id.* at 136.

Further, the Commission finds that substantial record evidence supports the AJ's finding that Complainant established that S2's explanation for his actions was pretextual. The record shows that S2 made the decision to recommend Complainant's termination 30 minutes after Complainant requested an appointment to meet with an EEO Counselor. S2 testified that he changed his mind and decided to terminate Complainant then rather than give him more time to improve after discussing the matter with S1. However, S1 testified that he could not recall speaking with S2 about Complainant. Thus, the Commission agrees with the AJ that there is no evidence supporting S2's reasons for changing his mind 30 minutes after he made the EEO appointment for Complainant. Further, while M1 was the deciding official for Complainant's termination and was unaware of Complainant's protected EEO activity at the time, the termination recommendation would not have been presented to M1 without S2's actions.

Accordingly, the Commission finds that substantial record evidence supports the AJ's finding that Complainant was subjected to reprisal.²

In light of the Commission's finding that the removal was motivated by reprisal, the Commission further agrees with the AJ that this matter should be reviewed under a mixed-motive analysis because the deciding official also provided a non-retaliatory reason for removing Complainant. Cases in which the employer acts on the basis of both lawful and unlawful reasons are known as "mixed-motive" cases. Mixed-motive analysis applies to cases in which there is a finding that discrimination was one of multiple motivating factors for an employment action, i.e., in which the agency acted on the bases of both lawful and unlawful reasons. See EEOC Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, EEOC Notice No. 915.002§ III.B.2 (July 14, 1992), as modified EEOC Notice No. 915.002 (Jan. 16, 2009). Under Title VII, a violation is established "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Once a complainant demonstrates that discrimination was a motivating factor in the employer's action, the burden shifts to the employer to prove, by clear and convincing evidence, that it would have made the same decision, even if it had not considered the discriminatory factor. See Price Waterhouse v. Hopkins, 490 U.S. 228, 249, 258 (1989); Tellez v. Dep't of the Army, EEOC Request No. 05A41133 (Mar. 18, 2005). If the agency makes this demonstration, the complainant is not entitled to personal relief such as damages, reinstatement, hiring, promotion, and back pay but may be entitled to declaratory relief, injunctive relief, attorney's fees, and costs. See DeArmas v. Dep't of the Treasury, EEOC Appeal No. 0720060085 (July 26, 2007); Walker v. Soc. Sec. Admin., EEOC Request No. 05980504 (Apr. 8, 1999).

The Commission finds that substantial record evidence supports the AJ's finding that the Agency presented sufficient evidence establishing that the same decision to terminate would have been made absent retaliation. M1, the deciding official, testified that he based his decision to terminate Complainant on the information regarding Complainant's conduct contained in the 1561 investigation. Hr'g Tr., at 133-34. M1 testified that the probationary period is an opportunity to take a look at an employee and to decide whether management wants to invest a full career in that individual. Id. at 133. M1 testified that based on what he saw in 1561 investigation, he did not want to invest in someone who treated his co-workers in the manner Complainant did. Id. at 134. Thus, the Commission finds that the AJ's finding that M1 would have terminated Complainant even absent an impermissible motive is supported by substantial record evidence. Accordingly, the Commission finds that Complainant is not entitled to personal relief, but is entitled to declaratory and injunctive relief.

² The AJ also found that Complainant had been subjected to discrimination based on sex/sexual orientation; however, the Commission notes that Complainant only alleged his termination was based on reprisal for prior protected EEO activity.

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 order. To the extent that it has not done so already, the Agency shall comply with the Order as slightly modified and set forth below.

ORDER

1. Within 60 calendar days from the date this decision is issued, the Agency shall pay Complainant all costs which he incurred in connection with this complaint;
2. The Agency shall provide Complainant a neutral reference in the event that any subsequent potential employer contacts the Navy as an employment reference;
3. Within 60 calendar days from the date this decision is issued, the Agency shall provide at least eight (8) hours of EEO training to all management officials and employees at the Puget Sound Naval Shipyard and Intermediate Maintenance Facility Shop 38 in Bramerton, Washington on the provisions of Title VII of the Civil Rights Act of 1964, including the right to work in an environment free from reprisal and sex (including sexual orientation) discrimination and the right to use the EEO system to remedy violations of EEO laws.
4. The Agency shall consider taking appropriate disciplinary action against S2. 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).
5. The Agency shall post a notice in accordance with the paragraph entitled "Posting Order."

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation to show that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Puget Sound Naval Shipyard and Intermediate Maintenance Facility Shop 38 in Bramerton, Washington 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 (K0618)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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).

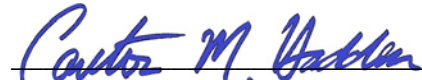
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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. Haddeen, Director
Office of Federal Operations

July 17, 2018
Date