



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

████████████████████
Chi E.,¹
Complainant,

v.

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

Appeal No. 0120170068

Agency No. 4J630013113

DECISION

On September 20, 2016, 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 August 22, 2016, 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 REVERSES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Full-Time City Carrier at the Agency's Florissant Post Office in Florissant, Missouri. In July 2012, Complainant became aware that his co-worker (CW1) had posted, in her workspace, offensive materials invoking the history of slavery and other racially inflammatory issues.

The materials included, most prominently, a satirical, simulated pre-Civil War era "wanted" poster depicting a person of color as a "runaway" and including, in part, the following text:

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.

REWARD!! CAPTURE AND RETURN RUNAWAYS from the DEMOCRATIC PARTY'S LIBERAL PLANTATION.

Any Person of Color claiming to be Republican, Conservative, or a member of the Tea Party is suspect and should be berated, insulted, abused, and returned. BE ON THE LOOK-OUT Runaways often speak in an uppity manner about rights of the individual, personal responsibility, the greatness of America, and other such nonsense.

THE DEMOCRATIC PARTY
THE PARTY OF JIM CROW
THE PARTY OF BULL CONNER

in the not so distant past would lynch People of Color for voting Republican. Then we learned it's far better to just buy their votes using taxpayer money, and for over forty years that is what we have done. WE OWN THEM!

Report of Investigation (ROI) at 257. (emphasis in original).

The Agency immediately caused the offensive materials to be removed. The following day the Agency placed CW1 on "emergency" leave without pay and ordered her removal from the workplace. ROI at 266.

CW1 filed a grievance challenging her removal from the workplace. The grievance decision found that CW1 had been improperly placed on emergency leave. On October 12, 2012, as a result of a grievance decision, the Agency ordered CW1 returned to the workplace. CW1's return to the workplace was not announced in advance to her co-workers. On the day of her return to work, two police officers were present, apparently for the purpose of protecting CW1 from her co-workers. On November 19, 2012, CW1 was issued a notice of removal. On December 31, 2012, CW1 retired from the Agency.²

On January 31, 2013, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of race (African-American) when a co-worker displayed racially insensitive material in the work area, and after being removed, the coworker was subsequently returned to the workplace in October 2012.

The Agency dismissed the complaint, but that decision was reversed by the Commission and the matter was remanded for further proceedings. EEOC Appeal 0120131663 (June 26, 2013). On remand, 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). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R.

² Brewer v. U.S. Postal Serv., EEOC Appeal No. 0120131786 (June 26, 2013) contains additional background information on this matter.

§ 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

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”).

It is well-settled that harassment based on an individual’s statutorily protected bases is actionable. See Meritor Savings Bank FSB v. Vinson, 477 U.S. 57 (1986). In order to establish a claim of harassment, Complainant must show that: (1) he belongs to the statutorily protected classes or engaged in prior EEO activity; (2) he was subjected to unwelcome conduct related to his membership in those classes or his prior EEO activity; (3) the harassment complained of was based on those classes or that activity; (4) the harassment had the purpose or effect of unreasonably interfering with his work performance 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).

With respect to element (5), an agency is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998). Where the harassment does not result in a tangible employment action, an agency can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that the complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. See Burlington Industries, supra; Faragher, supra; Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999) (Enforcement Guidance on Vicarious Employer Liability).

Complainant contends that the Agency’s act of reinstating CW1 to the workplace subjected her to hostile workplace harassment. In Complainant’s first appeal of this matter to the Commission, it was determined that the facts Complainant alleged stated a claim of hostile workplace harassment. Complainant v. U.S. Postal Serv., EEOC Appeal 0120131663 (June 26, 2013). (“ . . . Complainant has raised a viable claim of hostile work environment when the co-worker was returned to the work place.”)

To prove this 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. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

We find that, in light of the racially inflammatory, and clearly offensive nature of the material CW1 had displayed in the workplace, which the Agency determined was so offensive as to require CW1’s “emergency” removal from the workplace, the Agency’s act of returning CW1 to the same workplace on October 12, 2012, was itself racially hostile and abusive. Complainant’s negative reaction, and that of many of his coworkers, to the return of CW1 to their workplace, was foreseeable and entirely reasonable on their parts.

The Agency’s explanation that it returned CW1 to the workplace because it was directed to do so by the grievance panel’s decision is not supported by the record. The grievance decision in question directs that “[t]he grievant [be] returned to a pay status effective August 4, 2012, and be paid Administrative Leave from that date until her return to duty.” ROI at 286. The decision did not direct that CW1 be returned to duty at the Florissant Post Office. Nothing in the grievance decision precluded CW1’s reassignment to another facility.

In harassment cases, we have generally found that an agency may not involuntarily transfer or reassign the victim of the harassment, and the agency should instead transfer or reassign the harasser. See Yael S. v. U.S. Postal Serv., EEOC Appeal No. 0120143125 (Oct. 22, 2015); Jones v. U.S. Postal Serv., EEOC Appeal No. 0120101754 (Aug. 12, 2010) (where no persuasive evidence that harassment occurred, agency’s efforts to ensure that the complainant and alleged harasser were separated were deemed appropriate). Thus, the Agency did not take reasonable care to prevent future harassment and has failed to bear the burden of proving the affirmative defense available under Ellerth and Faragher, *supra*. See, Darcy F. v. U.S. Postal Serv. EEOC Appeal No. 0120162782 (Sept. 19, 2018) (arising from same incident as instant appeal).

For the foregoing reasons, we find that Complainant has proven that he was discriminated against when the Agency subjected him to hostile workplace harassment. The matter will be remanded for the Agency to address the issue of remedies.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed, the Agency’s final decision is REVERSED and the matter is REMANDED for proceedings consistent with this decision and the ORDER below.

ORDER

The Agency is ORDERED to take the following remedial action:

1. Within ninety (90) calendar days of the date this decision is issued, the Agency will conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages, and will afford him an opportunity to establish a causal relationship between the Agency's discriminatory actions and his pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages, and will provide all relevant information requested by the Agency. The Agency will issue a final decision on the issue of compensatory damages within thirty (30) calendar days of the completion of the investigation. 29 C.F.R. § 1614.110. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein.
2. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide at least eight hours of in-person or interactive EEO training to the responsible management officials regarding their responsibilities under Title VII, with special emphasis on the duty of managers with respect to hostile workplace harassment.
3. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the responsible management officials. The Agency shall report its decision to the Compliance Officer referenced herein. 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 the identified management officials have left the Agency's employment, the Agency shall furnish documentation of the departure date(s).
4. The Agency shall post a notice in accordance with the Order below.

POSTING ORDER (G0617)

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

ATTORNEY'S FEES (H1016)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (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 (R0610)

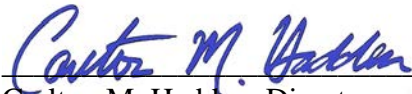
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (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, 2018

Date