



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

[REDACTED]
Katharine B.,¹
Complainant,

v.

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

Appeal No. 0120170444

Hearing No. 540-2013-00183X

Agency No. 1E871000612

DECISION

On November 10, 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 October 13, 2016, final order 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. For the following reasons, the Commission VACATES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Mail Handler at the Agency's Albuquerque Processing and Distribution Center in Albuquerque, New Mexico.

On June 8, 2012, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Hispanic), sex (female), and disability when:

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.

1. On December 7-8, 2011; December 9-10, 2011; December 12-13, 2011; December 15-16, 2011; and December 26-27, 2011, Complainant was denied higher-level pay;
2. On December 26-27, 2011; December 30-31, 2011; January 29, 2012; February 3, 11, 24, 2012; March 23, 2012; April 18, 2012; May 4-5, 30, 2012; June 13, 17, 29, 2012; July 14, 22, 29, 2012; September 21, 26-27, 2012; October 11-12, 17, 19, 2012; and November 16, 17, 2012, Complainant was removed from her bid assignment to work in other areas;
3. On December 26, 27, 30, 31, 2011; January 29, 2012; February 3, 11, 24, 2012; -- -March 3, 2012; April 1-8-2012; May 4, 5, 30, 2012; June-13,17, 29, 2012; July 14, 22, 29, 2012; September 21, 26, 27, 2012; October 11, 12, 17, 19, 2012; and November 16, 17, 2012, management created a hostile work environment between Complainant and co-workers regarding work assignments;
4. On December 26-27, 2011, Complainant was charged Absent Without Leave (AWOL) by her supervisor;
5. On December 27, 2011, Complainant's clock rings were erased while she was on the workroom floor;
6. On January 6 and 20, 2012; July 19, 2012; September 14 and 26, 2012; October 18 and 19, 2012; and, November 17, 2012 she was called into the office while on break;
7. On January 3, 2012, she was denied an approved change of schedule;
8. On February 4, 2012, she was followed into the restroom; on February 5, 2012, management officials were standing outside the bathroom as if they were watching and waiting for her;
9. On December 26-27, 2011, management rescinded a grievance settlement to change AWOL, expunge the AWOL from her record, and pay her for the time worked;
10. On January 29 and February 5, 2012, Complainant was subjected to fact-finding interviews;
11. On unspecified dates, Complainant was subjected to an excessive amount of safety observations and her co-workers were not;
12. On February 4, 2012, Complainant's supervisor told Complainant that her FMLA showed up denied in the Enterprise Resource Management System (ERMS);

13. On or about February 22, 2012, Complainant's supervisor told another supervisor that Complainant was filing a harassment claim on her and made derogatory comments, which made their way to the workroom floor;
14. On or about February 24, 2012 and March 3, 2012, Complainant was stalked by her supervisor;
15. On or about March 21, 2012, that Manager of Distribution Operations (MDO) yelled at her, threatened her with a factfinding interview and to be walked out of the building, and subjected Complainant to a fact-finding interview;
16. On or about March 29, 2012, Complainant was subjected to a fact-finding interview;
17. In April and May 2012, management consistently denied Complainant' union time and/or granted the time in an untimely manner;
18. On or about May 2, 2012, management threatened Complainant with AWOL;
19. On May 30, 2012, Complainant was assigned to flats at 0215 and sent back to the low cost tray sorter (LCTS) at 0220;
20. On August 16, 2012, management threatened to abolish Complainant's bid job if she did not sign the letter changing her begin tour;
21. On December 5, 2012, Complainant was given two different fact-finding interviews, one for Failure to Follow Instructions and the second one for Attendance;
22. On December 7 and December 14, 2012, Complainant was issued two Letters of Warning for Attendance;
23. On December 12, 2012, Complainant was issued a Letter of Warning for Failure to Follow Instructions;
24. On January 12, 2013, Complainant was issued an Emergency Placement in Off-Duty Status; and
25. On January 14, 2013, Complainant was ordered to report to duty and provide medical documentation for clearance to the Health Unit.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment

Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing on May 10-12, 2016.

During the hearing, Complainant objected to her supervisor's (S1) presence as both the Agency's representative and alleged responsible management official. The AJ overruled Complainant's objections. The AJ questioned each witness prior to their testimony whether they were comfortable with S1's presence in the hearing room, but otherwise allowed S1 to remain in the hearing room for the duration of the hearing. Four individuals requested that S1 leave the hearing room prior to their testimony, and S1 was excused during their testimony. Following the hearing, the AJ issued a decision on September 30, 2016 finding no discrimination. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the AJ erred by allowing Complainant's supervisor and alleged harasser, S1, to act as an Agency representative during the hearing. Complainant argues that despite the objection of Complainant's counsel, S1 sat in the hearing room and her presence at the hearing had an undue and unnecessary chilling effect on the testimony of the witnesses. In addition, Complainant asserts that S1's attendance at the hearing gave S1 an undue advantage when she testified as the Agency's last witness. Complainant further contends that the Agency's counsel did not provide any substantive reasons for S1's presence at the hearing and that in the instances when S1 did leave the hearing room, it was intimidating for witnesses to state in S1's presence that they were uncomfortable with her presence or feared retaliation. Further, Complainant claims that the Agency failed to timely and promptly notify Complainant's witnesses that they were expected to appear and testify at the hearing. Complainant asserts that the AJ erred by not sanctioning the Agency and that Complainant's counsel could not interview some of the witnesses in advance of the hearing or call the witnesses without undermining her case.

Additionally, Complainant alleges that the AJ erred when he refused to consider Complainant's claim that the agency failed to accommodate her disability or engage in the interactive process with her. Complainant claims that the AJ erred when he found that the Agency did not discriminate or retaliate against Complainant on the bases of gender, race, and disability. Complainant argues that the testimony provided by Agency officials, and relied upon by the AJ, was inconsistent and vague. Complainant argues that the AJ ignored credible evidence showing that Complainant's incapacitation at work was due to the harassment she suffered at the hands of Agency officials. Complainant contends that she submitted documentation from her treatment provider on multiple occasions and coworkers advocated on her behalf regarding the harassment, but management refused to intervene. Accordingly, Complainant requests that the Commission reverse the final order.

On appeal, the Agency argues that the AJ did not abuse his discretion in allowing S1 to act as the Agency representative at the hearing. Further, the Agency contends that Complainant did not provide evidence of the alleged chilling effect on other witnesses' testimony, as the AJ controlled the hearing room and allowed each individual to veto S1's attendance. The Agency claims that it provided timely and accurate witness information to Complainant's counsel; Complainant did not indicate what information was inaccurate or not current; Complainant's counsel did not attempt to contact witnesses until the weekend prior to the hearing; and Complainant's counsel had nearly three years to speak with witnesses. The Agency argues that the AJ did not err in refusing to allow Complainant to add a reasonable accommodation claim, stating that Complainant did not attempt to raise the matter until eight days before the hearing on May 4, 2016. Accordingly, the Agency requests that the Commission affirm its final order.

ANALYSIS AND FINDINGS

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 or not 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.

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 EEO Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

AJ's Allowance of Supervisor as Agency Representative

Complainant contends that the AJ erred when he allowed Complainant's supervisor and alleged harasser, S1, to act as an Agency representative during the hearing. Given the latitude that EEOC Regulation 29 C.F.R. § 1614.109 confers upon AJs to regulate the conduct of a hearing, a party seeking to challenge an AJ's ruling must show that the AJ abused his discretion in issuing that ruling. See Dona v. Soc. Sec. Admin., EEOC Appeal No. 0120150376 (Mar. 29, 2017). The Commission has found abuse of discretion by an AJ under a variety of circumstances. See Frederick A. v. Dep't of the Navy, EEOC Appeal No. 0120140377 (June 15, 2016)(dismissing complaint where Complainant's partial response did not rise to the level of contumacious conduct); Madaris v. U. S. Postal Serv., EEOC Appeal No. 0120131585 (Aug. 13, 2013) (taking testimony by telephone absent exigent circumstances or a joint request from the parties); Duckwiley v. General Services Admin., EEOC Appeal No. 0120103514 (Feb. 4, 2011) (excluding claim accepted for processing by the Agency and referred for investigation).

Here, we find that the AJ erred by allowing S1 to attend the hearing as a representative. Specifically, we find that in the interest of fairness, the EEO process, and the possible chilling effect at the Agency's facility, the AJ abused his discretion when allowing S1 to remain at the hearing. When an Agency's action has a potentially chilling effect on use of the EEO complaint process, the action violates the prohibition against interference with the EEO process. See Maximo S. v. Dep't of the Army, EEOC Appeal No. 0120182087 (Aug. 31, 2018).

The Commission has held that permitting a responding management official to attend a hearing and act simultaneously as a witness creates an inherent conflict of interest. Monroig v. U.S. Comm'n of Civil Rights, EEOC Appeal No. 07A10012 (Apr. 25, 2002). Specifically, in Monroig, Complainant was supervised by the Staff Director and the Deputy General Counsel. On appeal, the Agency argued that the AJ erroneously denied the Agency the right to attend the hearing through a designated representative when the Deputy General Counsel was precluded from attending the hearing. The Agency argued that Rule 615 of the Federal Rules of Evidence, "Exclusion of Witnesses" was applicable, and precluded the exclusion of "an officer or employee or a party who is not a natural person designated as its representative by its attorney." Complainant contended that the Deputy General Counsel was properly excluded from the hearing in light of the conflict of interest and the AJ's authority to control the attendance of the individuals at the hearing. Complainant further argued that permitting the Deputy General Counsel to attend the hearing and act as agency representative would have tainted the impartiality of the process given that she was one of the responding officials.

In Monroig, the Commission held that permitting the Deputy General Counsel, one of the responding management officials, to attend the hearing and simultaneously act as agency representative would create an inherent conflict of interest and tarnish other witnesses' testimony. EEO Management Directive 110 (EEO MD-110) (Aug. 5, 2015) requires that there be distance between the fact-finding and defensive functions of the agency in order to enhance the credibility of the EEO office and the integrity of the EEO complaints process. EEO MD-110, Chapter 1, at § IV (Aug. 5, 2015). The Commission ruled that even if the Deputy General Counsel had testified before all other witnesses at the hearing, her presence would discourage other employees from testifying freely at the hearing. The Commission noted that the Agency was well represented at the hearing despite the Deputy General Counsel's absence.

Accordingly, we find that a conflict of interest existed in the Agency's representation at the hearing and that Complainant is entitled to a new hearing, in which S1 may not be involved as an Agency representative. See Rabinowitz v. U.S. Postal Serv., EEOC Request No. 05930348 (Sept. 23, 1993) (officials involved in discrimination may not be involved in processing the complaint). Therefore, we are remanding the matter for further processing.

Based on our remand, we will not address the merits of Complainant's claims at this time.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, the Agency's final action is VACATED and we REMAND this matter for further processing pursuant to the order herein.

ORDER

Within 30 days from the date this decision is issued, the Agency shall submit a copy of its complaint file, along with a copy of this decision, to the Hearings Unit of the Denver Field Office. The Agency shall provide written notification to the Compliance Officer at the address set forth herein that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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)

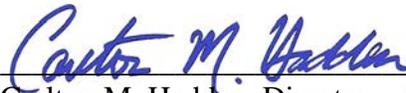
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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

December 7, 2018

Date