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

Horacio M.,[1]
Complainant,

v.

William Barr,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 0120170934

Hearing No. 510-2015-0094X

Agency No. BOP-2015-0094

DECISION

On January 25, 2017, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 4, 2017 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 VACATES the Agency's final order and REMANDS the complaint for an administrative hearing.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Case Manager at the Agency's Federal Correctional Complex in Coleman, Florida. Subsequent to counseling, Complainant filed a formal EEO complaint on November 21, 2014, alleging that the Agency discriminated against him on the bases of race (Caucasian), national origin (Irish), sex (male), and reprisal for prior protected EEO activity when, from September 26, 2013 to October 2014, he was subjected to a hostile work environment in the form of offensive racist comments, sexual and non-

[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.

sexual comments, and discrimination when his supervisor failed to inform him of training requirements, issued him a lower performance rating, and failed to appoint him to act as unit manager.

With respect to the comments, Complainant alleged that during this period of time, Complainant's supervisor (S1) made gender stereotyped comments about his height which had the effect of diminishing his masculinity. According to Complainant's affidavit, S1 suggested that Complainant wore children's underwear, needed a stepstool to have intercourse with his wife, was gay, a "Nazi," and a "prick." On September 2, 2014, when S1 called Complainant a "prick" in front of his co-workers, Complainant contacted the EEO office and his second line supervisor (S2) to complain. Complainant alleged that once he complained of the "prick" comment, he was subjected to retaliation when he received a lower performance log entry. Further, Complainant maintained he was not included in the same training session as other co-workers and, as a result, missed a team-building lunch.

At the conclusion of the investigation, Complainant was provided a copy of the investigative file and requested a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). The AJ issued a decision without a hearing finding no discrimination.

In her decision, the AJ concluded that Complainant's claims "defy credibility" and were not supported by evidence in the record, stating, "The record was devoid of any evidence, other than Complainant's self-serving allegations." The AJ noted that Complainant received "Outstanding" overall ratings and attended a different training session than other co-workers. The AJ also found that Complainant did not bring the alleged harassment to the attention of management until September 2014, and that S1 retired in October 2014, "removing the chance for any future 'harm.'" The AJ also noted that S1 was the same race and national origin as Complainant, and found no evidence that Complainant engaged in any other EEO activity other than the instant complaint.

The Agency's final action implemented the AJ's decision.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the AJ erred in crediting S1's affidavit because it was not signed. He claims that the AJ ignored S1's daily barrage of offensive, same-sex comments which humiliated and emasculated Complainant. Specifically, Complainant alleged S1 suggested he required an unaccompanied minor fee while flying, used a child's "Barney" suitcase, and had to label his underwear so as not to confuse it with his son's. Complainant also alleged that he contacted an EEO Counselor on September 2, 2014, and that he was subjected to retaliation when he was not informed about a change to his firearms training, and when he received a lower performance rating log entry. Complainant contends that S1 mocked him in front of others for filing an EEO complaint and threatened others not to "case him up" or they would lose their law enforcement retirement benefits. Complainant argued that he lost concentration at work and underwent mental health counseling because of the harassment.

In response, the Agency contends that the Complainant cannot establish liability for a hostile work environment because once it learned of the harassment, it took appropriate remedial action by referring the matter to the Office of Internal Affairs. However, the Agency also noted that it administratively closed that investigation once S1 retired. The Agency argued that documentary evidence in the record does not establish any link between Complainant's membership in a protected class and any of the alleged harassing conduct.

STANDARD OF REVIEW

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chap. 9, § VI.A. (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").

ANALYSIS AND FINDINGS

We must first determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. 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.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." Anderson, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an AJ could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrener, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." Pedersen v. Dep't of Justice, EEOC Request No. 05940339 (February 24, 1995).

After a careful review of the record, we find that the AJ erred when she concluded that there was no genuine issue of material fact in this case. In finding no discrimination, the AJ relied on the unsworn affidavit of S1,[2] who was the alleged harasser. Further, the AJ inappropriately credited S1's affidavit rather than Complainant's, whose assertions as the non-moving party should have been assumed to be true.

Although the AJ found no evidence of harassment based on Complainant's sex, we disagree. In addition to Complainant's affidavit, the record contains other corroborating affidavits from Complainant's co-workers, which were not referenced by the AJ, supporting Complainant's claim that he was harassed because he did not fit his supervisor's image of a "masculine" male. ROI at p. 64, 116. For example, one witness (W1) stated that S1 made comments about Complainant's height. ROI at p. 116. We note that Title VII's prohibition of discrimination on the basis of sex includes discrimination on the basis of "gender" and includes discrimination because an individual fails to conform to gender-based expectations, stereotypical or otherwise. See Macy v. Department of Justice, EEOC Appeal No. 0120120821 (April 20, 2012) (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

[2] After the EEO investigator received S1's unsigned interrogatory, she emailed him three (3) times requesting that he initial and sign it. S1 did not provide a signed copy. ROI at p. 79.

We also find sufficient evidence in the record which raises a genuine dispute of material fact regarding Complainant's retaliation claim. A witness (W2) averred that Complainant's complaints "fueled the fire," and that he was treated as S1's "whippin' boy." W2 added that S1 was "picking on [Complainant] all the time," and that S1 was "doing as much as he possibly could" prior to his October retirement. ROI at p. 151-152. Another witness (W3) stated that Complainant was called a "rat," and that S1 was "always belittling him." ROI at p. 172-173. These affidavits also provide support for Complainant's claim that others were threatened with losing their law enforcement credentials for retirement if they were "cased up." ROI p. at 150, 173. This evidence was seemingly disregarded by the AJ, but we find it raises a genuine dispute as to whether Complainant was subjected to severe or pervasive conduct that created a hostile work environment after he complained about the supervisor's conduct.

We note that the hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 7-1 (Aug. 5, 2015); see also 29 C.F.R. § 1614.109(e). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims." Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (March 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (October 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995).

In addition to the statements by Complainant and S1, we find that the record contains conflicting evidence with statements from five (5) coworkers who stated that they did not witness any harassing conduct and statements from three (3) coworkers who provided support for Complainant's claims. We find that the parties should be afforded an opportunity to cross-examine the available witnesses. In summary, there are simply too many unresolved issues which require an assessment as to the credibility of the various management officials, co-workers, and Complainant, himself. Therefore, judgment as a matter of law for the Agency should not have been granted.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission VACATES the Agency's final action and REMANDS the matter to the Agency in accordance with this decision and the Order below.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Miami District Office Hearings Unit within thirty (30) calendar days of the date this decision is issued. The Agency shall provide written notification to the Compliance Officer at the address set forth below 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)

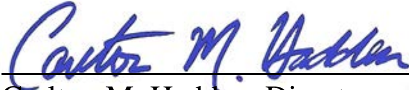
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

April 9, 2019
Date