



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

[REDACTED]
Alycia R.,¹
Complainant,

v.

Dr. Benjamin S. Carson, Sr., M.D.,
Secretary,
Department of Housing and Urban Development,
Agency.

Appeal No. 0120172284

Hearing No. 570-2014-00748X

Agency No. HUD000462009

DECISION

On June 19, 2017, 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 April 20, 2017, final decision 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 AFFIRMS the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Senior Special Agent, GS-1811-14, at the Agency's Office of Inspector General, Criminal Investigation Division (CID) in Washington, D.C. Prior to that, Complainant worked at the Agency's facility in Newark, New Jersey. While in Newark, Complainant claimed that she was subjected to harassment that began in 2005 and continued through 2008.

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 alleged that the Assistant Special Agent-in-Charge (ASAC-1) failed to provide her with any additional assistance for her law enforcement needs and that ASAC-1 would always mandate that she participate when other Agents needed support. Further, Complainant claimed that she did not receive overtime pay and instead she was given compensatory time.

In or around January 2008, Complainant worked a 30-day detail assignment in the CID in Washington, D.C. Complainant claimed that she was not properly compensated while on the detail assignment. Complainant contended that when she inquired about compensation for the detail, ASAC-1 told her that she should not press the issue or upset the Special Agent-in-Charge (SAC). Further, Complainant alleged that ASAC-1 harassed her by routinely calling her and requesting that she submit reports, make corrections, and answer questions regarding her New Jersey investigative case work.

In April or May 2008, Complainant applied for and received a promotion to a Senior Special Agent position in CID in Washington. Complainant claimed that as part of her promotion, she was granted relocation benefits and authorized to travel to Washington for a 10-day house hunting trip. On August 22, 2008, Complainant's then-supervisor, the Assistant Special Agent-in-Charge (ASAC-2) spoke with ASAC-1 about Complainant's pending promotion. ASAC-2 informed ASAC-1 that Complainant had work that needed to be completed prior to Complainant taking leave the next day. Complainant was instructed to complete her work, but she failed to do so. Complainant's leave was ultimately disapproved, but Complainant left for Washington without completing the assignments. Additionally, on August 28, 2008, Complainant called ASAC-2 and informed her that her Government Owned Vehicle (GOV) had been towed from her residence. ASAC-2 instructed Complainant to contact the regional supervisors about the vehicle. Complainant failed to do so. ASAC-1 and SAC later informed Complainant to write a notarized letter and provide it to them to retrieve the car out of the impound. Complainant never provided the letter.

Complainant alleged that she began to look for a house on August 29, 2008 and was notified that same day to return to her residence in New Jersey and to not utilize her Government Travel Card to secure lodging. Complainant claimed that she was told that her promotion had been rescinded and that she needed to have her household items that were already in storage returned to New Jersey. Complainant stated that she did as instructed, returned to New Jersey, and secured a hotel room using her own funds. Complainant contacted her realtor and advised her to cease lease negotiations. The reassignment was ultimately reinstated, but on November 21, 2008, Complainant was issued a notice of proposed five-day suspension for failure to follow supervisory instructions; disrespectful or unprofessional behavior towards a supervisor; and failure to notify a supervisor of impounded GOV for the issues that arose prior to her promotion.

In September 2008, Complainant alleged that ASAC and SAC had falsely reported to senior management that she had tape recorded conversations. Complainant claimed that was questioned by the Ombudsman and the Deputy Assistant Inspector General for Investigations about the matter.

In November 2008, Complainant received her Fiscal Year 2008 performance appraisal from the Assistant Special Agent-in-Charge (ASAC). ASAC rated Complainant as “Fully Successful;” however, Complainant believed her rating should have been “Outstanding.” Complainant did not sign the appraisal.

Complainant claimed that management officials denied several of her requests for training. Management officials confirmed that Complainant was granted multiple requests for training. For example, ASAC-1 stated that Complainant attended the National Organization of Blacks in Law Enforcement conference in 2007 and 2008, and the Reid Interviewing Training Course in 2007. ASAC-1 affirmed that the only training Complainant was expressly denied was the LDP program because it was suspended and Procurement training because she needed to complete unfinished work assignments.

In March 2009, Complainant alleged that a co-worker (CW-1) subjected her to sexual harassment. Complainant claimed that CW-1 made several offensive comments about her appearance and comments about his sex life with his girlfriend. Additionally, Complainant claimed that CW-1 showed her pornographic images on his computer at his cubicle. Further, Complainant alleged that CW-1 received a FedEx package intended for her and kept it as “leverage in his quest to have sex with [her.]”

On February 24, 2009 (and amended on May 28, 2009), Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female), color (Black), disabilities (mental and physical), and in reprisal for prior protected EEO activity when:

1. From August 29, 2008 to the present, Complainant has been subjected to continual harassment and hostile working environment;
2. Complainant’s requests for training were denied or given to other employees;
3. Complainant’s requests for work assignments were denied or given to other employees; and
4. Complainant was subjected to sexual harassment by a co-worker who, on March 9, 2009, made sexual comments to her; and on March 23, 2009, showed the complainant pornographic pictures on his government owned computer.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing, but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. From that decision, Complainant brings the instant appeal.²

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”).

Hostile Work Environment – Non-Sexual Harassment

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) she belongs to the statutorily protected classes or engaged in prior EEO activity; (2) she was subjected to unwelcome conduct related to her membership in those classes or her 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 her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

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

In this case, Complainant alleges, among other things, that her reassignment was rescinded, she received a lowered performance rating for Fiscal Year 2008, and the Agency sought to suspend her for 5 days as part of a pattern of harassment.³

² The Agency claims that Complainant’s appeal is untimely. That claim is unavailing here because the Agency has failed to provide any evidence of the date on which Complainant received the final decision, the date from which timeliness of an appeal is calculated.

³ Most of the discrete events that are alleged to form part of the pattern of harassment occurred more than 45 days before Complainant initiated contact within an EEO counselor and are time-

Complainant has not demonstrated that the alleged actions were sufficiently severe or pervasive to establish a hostile work environment. Even assuming that the alleged conduct was sufficiently severe or pervasive to create a hostile work environment, there is no persuasive evidence in the record that discriminatory animus played a role in any of the Agency's actions. For example, with regard to her reassignment, management officials stated that Complainant's conduct resulted in a temporary reconsideration of her suitability for a promotion. The promotion job offer was rescinded temporarily, but management decided to process the promotion and conduct issues separately, and Complainant's offer was restored. As to the suspension, it was issued based on multiple instances of Complainant failing to follow supervisory instructions and her display of disrespectful behavior toward a supervisor. For instance, Complainant failed to complete several assignments prior to taking leave for her impending promotion and transfer, and left despite the leave having been disapproved. Further, Complainant failed to follow management's instructions regarding her impounded GOV. Based on numerous incidents of misconduct, ASAC-2 issued Complainant the Notice of Proposed Five-Day Suspension. Complainant did not serve the suspension.

With respect to claims (2) and (3), according to the Agency, Complainant was not sent to National Mortgage Licensing Training because limited funds were available for training and the subject matter of the training was unrelated to her job assignment. ROI at 374. The Agency explains that the procurement training previously scheduled for Complainant was cancelled and another Special Agent with a background in procurement was sent because of the problems that had delayed Complainant's transfer to CID. *Id.* These are legitimate nondiscriminatory reasons for the Agency's actions. Complainant has failed to show they are pretext designed to conceal discriminatory animus.

Regarding claim (3), management explained that Complainant was primarily assigned to mortgage fraud and Federal Housing Administration matters. Complainant, like other GS-14 Desk Officers, was encouraged to explore the subject area of responsibility and develop notable expertise in that subject matter. She did not need to ask for assignments in her assigned area. Subjects outside the assigned area of responsibility, if they did not conflict with assignments held by other staff, could be undertaken but only after work associated with the primary assignment was completed.

After reviewing the evidence in its entirety, we find that Complainant has not shown that she was subjected to a discriminatory or retaliatory hostile work environment. To the extent that Complainant claims she was subjected to disparate treatment, the Commission finds that, as discussed above, Complainant has not proffered any evidence from which a reasonable fact finder could conclude that that Agency's explanation for its actions was pretext for discrimination or reprisal.

Hostile Work Environment – Sexual Harassment

barred as independent causes of action. We have considered these claims as background evidence in support of Complainant's overall hostile work environment claim.

Complainant alleges that CW-1 subjected her to sexual harassment in March 2009 by making sexual comments to her and showing her pornographic pictures on his “government owned computer.” To establish a claim of sexual harassment, Complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to unwelcome conduct related to her sex, including sexual advances, requests for favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based on sex; (4) the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer, in other words, did the agency know or have reason to know of the sexual harassment and fail to take prompt remedial action. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the complainant's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (Mar. 8, 1994).

Assuming without deciding that Complainant has satisfied the first four elements of a prima facie case of harassment as set forth above, the question of Agency liability remains. An agency is liable for harassment by a coworker or other non-supervisor when it knows or should have known of the conduct, unless the Agency can show that it took immediate and effective corrective action. Whether the Agency's action is appropriate depends upon “the severity and persistence of the harassment and the effectiveness of any initial remedial steps.” Taylor v. Dep't of the Air Force, EEOC Appeal No. 05920194 (July 8, 1992); Owens v. Dep't of Transp., EEOC Appeal No. 0590824 (Sept. 5, 1996). Appropriate agency corrective action is reasonably calculated to stop the harassment. Parker v. Dep't of the Navy, EEOC Appeal No. 0120100303 (Jul. 20, 2012).

Here, the evidence shows that, sometime during the week of March 23, 2009, Complainant informed an acting supervisor about CW1's unwelcome behavior. The acting supervisor undertook to report CW1's conduct to the supervisor (S1) for whom he was acting when S1 returned from training. He did so when S1 returned to duty after March 27, 2009. In response, S1 counseled CW1 for making comments in Complainant's presence “that she [Complainant] did not like.” ROI at 491. The witnesses, other than Complainant, testified that, in raising her concerns, Complainant did not use the term “sexual harassment” or indicate that CW1's actions were of a sexual nature. ROI at 557, 565. Complainant does not dispute that, after S1's counseling, CW1 did not repeat the harassing behavior. In light of the evidence of Complainant's failure to specify the sexual nature of CW1's actions and CW1's apparent compliance with S1's warnings, we conclude that the Agency's corrective action was proportionate and effective. For that reason, the Agency is not vicariously liable for the CW1's actions.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

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

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

March 08, 2019

Date