



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

[REDACTED]
Stanton S.,¹
Complainant,

v.

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

Appeal No. 0120172696

Agency No. 4F-945-0049-16

DECISION

On August 1, 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 July 6, 2017, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a PSE Sales and Services/Distribution Associate at the Agency's Seven Trees Station in San Jose, California.

During this time period, the Agency was awarded a contract with Amazon to deliver packages, including on Sundays. The Agency indicated that all PSEs had to be trained and available for scheduling for Amazon deliveries. On August 14, 2014, Complainant submitted a written request to his Manager for a religious accommodation, stating that due to his religious beliefs he is not permitted to work on Sunday. He asked that he not be assigned to work, including making Amazon deliveries, on Sundays. The Manager responded to Complainant's religious accommodation request in writing, notifying him that another employee had volunteered to work on Sundays so he would not need to be routinely assigned to work on that day.

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.

However, she indicated that Complainant needed to complete the scheduled training on processing Amazon packages so that he could be used as a back-up if the other employee was stuck or unable to report to work. Complainant was scheduled to work from 6:00 a.m. to 8:00 a.m. on Sunday, September 7, 2014, in order to be trained on the processing of Amazon packages. Complainant did not report to work on Sunday, September 7, 2014.

The Manager then assigned Complainant to training sessions scheduled for Sunday, September 14, 2014, and Sunday, September 21, 2014. Again, Complainant did not attend either session. Complainant was marked as absent without official leave (AWOL) on September 7, 14, and 21, 2014, for a total of 12 hours.

The Agency issued Complainant a Notice of Removal on October 3, 2014, for failing to report to work on three consecutive Sundays, as well as failure to report to work on September 11 and 12, 2014 (Thursday and Friday), on which he used approved sick leave and/or annual leave. Subsequently, on October 30, 2014, Complainant was issued another Notice of Removal for failure to follow instructions and unacceptable conduct when he was questioned by management.

On July 9, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), religion (Methodist), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. On September 3, 2014, his request for religious accommodation was denied.
2. On October 3, 2014, he was issued a Notice of Removal ("Removal 1") to be effective November 7, 2014.
3. On October 30, 2014, Complainant was issued a second Notice of Removal ("Removal 2") to be effective on November 30, 2014.

At the conclusion of the investigation into his claims, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

The Agency's decision concluded that Complainant failed to prove that the Agency subjected him to discrimination or unlawful retaliation as alleged. The Agency found that Complainant failed to show that the Agency denied him a religious accommodation. The Agency held that Complainant was terminated for being absent for three Sundays along with two days when Complainant took sick and/or annual leave. Subsequently, Complainant was removed for failing to follow orders and using profanity in Removal 2. The Agency concluded that it attempted to accommodate Complainant's religious beliefs by using another employee to work most Sundays, but, due to the requirements of his position, Complainant needed to be available as a Sunday back-up and needed relevant training. The Agency noted that Complainant refused to participate in the required Sunday training sessions, resulting in the AWOL charges.

This appeal followed.

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”).

Religious Accommodation Claim

Under Title VII, employers are required to accommodate the religious practices of their employees unless a requested accommodation is shown to impose an undue hardship. 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(b)(1).

The traditional framework for establishing a prima facie case of discrimination based on religious accommodation requires Complainant to demonstrate that: (1) he or she has a bona fide religious belief, the practice of which conflict with their employment, (2) he or she informed the Agency of this belief and conflict, and (3) the Agency nevertheless enforced its requirement against Complainant. Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993); Turpen v Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984).

Once Complainant establishes a prima facie case, the Agency must show that it either accommodated complainant's religious beliefs or that the request could not be granted without imposing an undue hardship on the Agency's operation. See Tiano v. Dillard Dept. Stores, Inc., 139 F.3d 679, 681 (9th Cir. 1998); Redmond v. GAF Corp., 574 F.2d 897, 902 (7th Cir. 1978); Complainant v. U.S. Postal Serv., EEOC Request No. 05890532 (Oct. 25, 1989). Pursuant to 29 C.F.R. § 1605.2(a)-(e), the Commission's “Guidelines on Discrimination Because of Religion” (the Guidelines), alternatives for accommodating an employee's religious practices include, but are not limited to, voluntary substitutes and swaps, flexible scheduling, and lateral transfers and job changes. Undue hardship does not become a defense until the employer claims it as a defense to its duty to accommodate. Ansonia Bd. of Ed. v. Philbrook, 479 U.S. 60, 68-69 (1986). In order to show undue hardship, an employer must demonstrate that an accommodation would require more than a de minimis cost. Trans World Air., Inc. v. Hardison, 432 U.S. 63, 74 (1977).

Upon review of the record, we find that Complainant has established a prima facie case of denial of religious accommodation. The record establishes that Complainant has a bona fide religious belief that he must not work on Sundays. The Agency sought to assign him to work on Sundays as a backup to another PSE in order to complete the Amazon package deliveries. In addition, the Agency instructed Complainant to attend training on September 7, 14, and 21, 2014, which were Sundays.

Complainant clearly provided the Agency with a letter indicating his belief and that he could not be tasked with the Sunday work assignment. In response, the Agency indicated that they found another employee to take on the regular Sunday assignment. However, the Agency still required Complainant to come to work on three consecutive Sundays to attend training, as well as indicate that he would be expected to work some Sundays as a backup to the other PSE. Accordingly, Complainant has shown that the Agency essentially denied his religious accommodation.

The burden shifts to the Agency to prove it made a good faith effort to reasonably accommodate Complainant's religious beliefs or that the accommodation could not be granted without imposing an undue hardship on the Agency's operation. In the case at hand, the Agency indicated that it had a volunteer to perform the Sunday Amazon deliveries. However, the Agency still insisted that Complainant would be required to work on Sundays when needed as backup and required him to attend training on three consecutive Sundays. The Agency provided no reason for why the training could only occur on Sunday. In addition, the Agency did not provide any evidence regarding the availability of other employees rather than Complainant who could be used as a Sunday backup for the Amazon deliveries. As such, we conclude that the Agency failed to meet its burden of proving undue hardship in granting Complainant's religious accommodation. Therefore, we conclude the Agency violated its obligations under Title VII.

Further, based on Complainant's failure to attend the training, Complainant was issued Removal 1. Specifically, the Agency indicated that Complainant was "irregular in his attendance," citing to Complainant's three AWOL Sunday assignments for 12 hours.² Management witnesses indicated that the reasons for Removal 1 were failure to follow instructions, irregular attendance, and AWOL. We find that these reasons were directly related to the Agency's order to Complainant to attend training on three consecutive Sundays. The Customer Service Supervisor, who issued Removal 1, specifically stated that the reason for the Agency's action was that, "[Complainant] was on the schedule to work [attend the training] on Sundays, when he did not show up for work as scheduled he was charged AWOL." As such, we find that Removal 1 was inextricably intertwined with the Agency's unlawful denial of religious accommodation. Therefore, we find that the issuance of Removal 1 also constitutes a violation of Title VII.

Retaliation for Accommodation Requests Claim

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to prevail, he or she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, *i.e.*, that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

² Although the removal notice additionally referenced Complainant's leave use on September 11 and 12, 2014, when addressing his attendance issues, there is no evidence that his absence on these two dates alone would have resulted in the decision to remove him.

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

Complainant can establish a prima facie case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Social Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Specifically, in a reprisal claim, and in accordance with the burdens set forth in McDonnell Douglas, Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976), and Coffman v. Dep't of Veteran Affairs, EEOC Request No. 05960473 (Nov. 20, 1997), a complainant may establish a prima facie case of reprisal by showing that: (1) he engaged in a protected 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 the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). The burden of production then shifts to the Agency to articulate a legitimate, non-discriminatory reason for the adverse employment action. In order to satisfy his burden of proof, Complainant must then demonstrate by a preponderance of the evidence that the agency's proffered reason is a pretext for disability discrimination

In claim (3), Complainant established the elements of a prima facie case of unlawful retaliation. The record indicated that Complainant engaged in protected activity when he requested the religious accommodation. EEOC Compliance Manual Section 12: Religious Discrimination § 12-V.B (2008), see also Ollis v. HearthStone Homes, Inc., 495 F.3d 570 (8th Cir. 2007) (upholding jury verdict finding that an employee's complaints about required participation in activities violate his religious beliefs constituted protected activity under Title VII); Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 190 (3d Cir. 2003). The Manager and the Supervisor were clearly aware of the Complainant's protected activity. He was issued Removal 2 within a month of the Agency's denial of Complainant's religious accommodation. As such, we find that there was a nexus between Removal 2 and Complainant's protected activity.

The October 30, 2014 notice of removal indicated that Complainant was being removed for "Unacceptable Conduct/Failure to Follow Instructions". The Manager, who concurred in the removal action, stated in her affidavit that Complainant exhibited inappropriate behavior during his "Just Cause Interview" conducted on October 21, 2014, with the Supervisor³ when he became "angry, disrespectful" and used "profanity". It appears that the "Just Cause Interview" was being held with Complainant to discuss his refusal to come into the office on October 17, 2014, to sign paperwork concerning the AWOL charges he received for not coming to work on the three Sundays for Amazon training, as well as his refusal to stay late on October 14 and 15.

³ The Supervisor did not provide an affidavit for the investigation.

According to the notice of removal, when the Supervisor tried to discuss Complainant's behavior during the interview, Complainant responded "I don't care! I don't care about the post office! You're going to fire me in 2 weeks anyway [referring to the effective date of Removal 1]." The Supervisor and Complainant continued the discussion regarding Removal 1 and Complainant responded, "Fuck them! Fuck all them crackers!" Complainant then collected his belongings, clocked out and left the facility without obtaining permission to do so. When viewed in isolation, the Agency articulated legitimate, non-discriminatory reasons for issuing Removal 2 – indicating it was provoked by Complainant's misconduct.

Complainant must now prove that the Agency's proffered reason was a pretext for unlawful retaliation. As noted above, the Agency failed to obtain an affidavit from the supervisor who issued Removal 2. The Manager, as the concurring official, focused on the supervisor's interaction with Complainant regarding the "Just Cause Interview," which was directly connected to Complainant's charges of AWOL based on the Agency's failure to provide him with a religious accommodation. While Complainant's conduct during the October 21, 2014 interview was inappropriate considering he used profanity and walked out of the meeting, the evidence of record does not support a finding that this conduct would have resulted in a removal action had it not been for the conflict over Complainant's requests for religious accommodation and the imposition of Removal 1, which we have already found was unlawful. We note that the October 30, 2014 notice of removal explicitly states that the pending Removal 1 was considered in reaching the decision to issue Removal 2. Accordingly, we find that, more likely than not, Complainant's engagement in protected activity played a significant role in the decision to issue Removal 2. As such, we conclude that the Agency's issuance of Removal 2 was, at least in part, in retaliation for Complainant's protected activity.⁴

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final decision and REMAND the matter in accordance with the ORDER below.

⁴ Given our conclusion that Complainant established that he was subjected to discrimination based on denial of religious accommodation and unlawful retaliation, we need not address the other alleged bases, as under the circumstances of this case, a finding on the additional bases would not entitle him to any greater relief.

ORDER

The Agency is ordered to take the following remedial action:

- I. Within 60 days of the date this decision is issued, the Agency shall retroactively reinstate Complainant to the position he would have held absent the unlawful discrimination/retaliation. Further, the Agency shall remove and expunge all documents and records relating to Removal 1 and Removal 2 from all Agency official personnel files.
- II. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision was issued. The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
- III. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages incurred as a result of the Agency's discriminatory actions. Within fifteen (15) calendar days of the date this decision is issued, the Agency shall give Complainant notice of his right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of his claims for compensatory damages within forty-five (45) calendar days of the date the Complainant receive the Agency's notice. The Agency shall complete the investigations on the claim for compensatory damages within forty-five (45) calendar days of the date the Agency receives Complainant's claim for compensatory damages. Thereafter, the Agency shall process the claim in accordance with 29 C.F.R. § 1614.110.
- IV. The Agency is directed to provide at least eight (8) hours of in-person training for the Manager and the supervisors responsible for issuing both removal notices, particularly focusing on providing religious accommodations and eliminating retaliation in the workplace.
- V. The Agency shall consider issuing disciplinary action against the Manager and the supervisors who were found to have subjected Complainant to a denial of religious accommodation and unlawful retaliation.

- VI. The Agency shall report its decision in its compliance report discussed below. If the Agency decides not to issue any disciplinary action, it shall set forth the reason(s) for its decision.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Seven Trees Station facility 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 (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/she 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 this decision becoming final. 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).

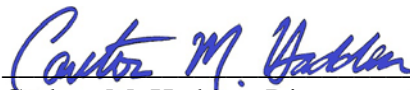
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

February 5, 2019

Date