



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

[REDACTED]
Henry L.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of the Army,
Agency.

Appeal No. 0120172820

Agency No. ARPOLK15MAY01692

DECISION

On August 22, 2017, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 9, 2017 final decision concerning an equal employment opportunity (EEO) complaint claiming 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

During the period at issue, Complainant worked as a Lead Physical Evaluation Board Liaison Officer ("PEBLO") at the Agency's Integrated Disability Evaluation System (IDES), Bayne-Jones Army Community Hospital, U.S. Army Medical Command (BJACH) in Fort Polk, Louisiana.

On June 16, 2015, Complainant filed a formal EEO complaint claiming he had been subjected to ongoing harassment/a hostile work environment in reprisal for participating in prior EEO activity.

After the investigation of his complaint, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an EEOC Administrative Judge. In accordance with Complainant's request, the Agency issued a final decision on August 9, 2017, pursuant to 29 C.F.R. § 1614.110(b), finding no discrimination.

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.

The instant appeal followed. On appeal, Complainant argues that his case “mirrors” that of another Lead PEBLO under the same management (hereinafter referred to as “ML”), who experienced that same hostile work environment as him. Complainant indicates that an EEOC administrative judge determined that ML was the victim of unlawful retaliation for a virtually identical complaint and ordered the Agency to remedy her.

ANALYSIS AND FINDINGS

To prove his harassment/hostile work environment claim, Complainant must establish that he was subjected to conduct that was either so severe or so pervasive that a “reasonable person” in Complainant’s position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of retaliatory animus. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

Complainant has been a Lead PEBLO since January 2011, and was responsible for assigning, distributing and balancing daily workload, establishing priorities, assuring timely completion of work, and monitoring status of work. Complainant also counseled military personnel, retirees, and families being processed through the Army Physical Disability Evaluation System (APDES) on their rights, benefits, privileges or obligations, as well as entering data into the Medical Evaluation Board Internal Tracking Tool. Complainant’s first line supervisor was the Supervisory Health Systems Specialist (“Supervisor”). His second line supervisor was the Chief of the Department of Solider Readiness (“Chief”). Complainant received Excellent performance reviews for the three years preceding the events at issue from the Supervisor and the Chief.

In 2014, ML filed a grievance indicating she was being discriminatorily harassed and bullied by a male subordinate (“Employee C”) and management was aware of his actions but had done nothing to protect her. Her grievance resulted in an AR 15-6 investigation² into these allegations of bullying, and the lack of leadership and support from management. Complainant was among those interviewed during the investigation. The investigator determined that Employee C had “exhibited disrespectful, intimidating and aggressive behavior” towards both ML and Complainant, in their role as Leads, and that his behavior had been allowed to go unchecked for years. As a result, upper level management issued Employee C disciplinary action in the form of a suspension, and both the Supervisor and the Chief were issued letters of counseling for their failure to take timely and appropriate action to prevent Employee C’s continued misconduct.

ML later filed an EEO complaint alleging she was being subjected to ongoing retaliation from Employee C and her management as a result of reporting Employee C’s behavior and the lack of support from her managers. Complainant was again a witness for ML during the processing of

² An “AR 15-6 investigation” refers to an administrative fact-finding investigation initiated pursuant to Army Regulation 15-6.

her EEO complaint. It is undisputed that the Supervisor and the Chief were aware of Complainant's participation as a witness in support of ML.

Following a hearing in ML's case, an EEOC Administrative Judge (AJ) issued a bench decision on July 8, 2016, concluding the Agency had unlawfully retaliated against ML, and ordered the Agency to undertake a variety of remedies, including payment to ML of compensatory damages and attorney's fees, as well as providing training to the responsible management officials, consideration of disciplinary action against Employee C and management officials, and the posting of a notice. See EEOC Hearing No. 461-2016-00005X, Agency No. ARPOLK15MAR00813, bench decision issued on July 8, 2016. It appears that the Agency accepted the AJ's finding of retaliation against ML as there is no record that it filed an appeal with this Commission.

In his own EEO complaint, Complainant has alleged virtually the same claims as those alleged by ML, including that management allowed the misconduct of Employee C towards the two Leads to go unchecked, which resulted in other employees also not respecting the Lead PEBLOs. Complainant also alleged that the Supervisor engaged in an ongoing pattern of retaliatory microaggressions against him for his participation in ML's AR-15 investigation and EEO complaint.

Complainant asserted that, despite their awareness of the situation, management allowed subordinates to be rude to him and to treat him with respect. Specifically, Complainant claimed that Employee C treated him in a hostile and bullying manner, and another named female PEBLO, and two female Administrative Assistants were allowed to be rude to him. Complainant claimed that Employee C constantly told Complainant that he was not his supervisor and criticized him and ML in front of other staff, stating they did not know what they were doing. Complainant further alleged that the Supervisor had frequently observed this behavior. The Supervisor denied that he or the Chief had witnessed Employee C's rude and harassing behavior towards Complainant and ML. We note, however, that the AJ in ML's case, who observed the witnesses during her hearing, specifically determined that management was aware of Employee C's misconduct towards Complainant and ML, but failed to do anything about it. We also note that the Agency itself, as a result of its AR 15-6 investigation, issued letters of counseling to both the Supervisor and the Chief for their failure to properly address Employee C's misconduct towards the Leads.

Complainant further alleged that management failed to support his authority, reinforce his role as a Lead, and allowed subordinate employees to bypass him. The Chief acknowledged that the staff routinely bypassed Complainant and ML and that he tried to correct it, stating, "I directed the leads to decrease their case load to half that of the other PEBLOs so they are more available to the other PEBLOs when needed. They have still not accomplished this. Of note, in a sensing session we had conducted last year, one of the findings was that the other employees couldn't see the need for lead PEBLOs. [The Supervisor] and I have been trying to overcome this perception, but have been largely unsuccessful."

The Deputy Commander for Administration (“the Deputy Commander”) stated that there was some truth to Complainant’s claim that management failed to support his authority, reinforce his role as a lead, and allowed employees to bypass him. Specifically, the Deputy Commander stated that the Supervisor and Chief, “were not leveraging the leads as intended.”

Complainant also alleged that his work was scrutinized more closely by management than the work of other employees following his support of ML’s EEO complaint. The Supervisor responded that he and the Chief “consistently remind the Leads . . . [that they are] expected to be held to a higher standard. They are GS-11, Lead PEBLOs, while the other PEBLOs are GS-9.” The Chief asserted either the Supervisor or he review reports the Lead PEBLOs “prepare before they are sent forward. The leads also continue to process cases. We review their product exactly as we do the other PEBLOs.”

Complainant asserted that the Supervisor displayed aggressive verbal and body language toward him on a regular basis. Complainant said that the Supervisor was inconsistent in his communication and that he never knew from day to day if he would get the “hot tongue,” or if the Supervisor would just wave him off or walk away. Among the examples given by Complainant, he recounted a time when there was a problem with the time cards and Complainant asked the supervisor to intervene. Complainant said that the Supervisor slammed his hand on the desk and yelled that Complainant should “not to tell him what his job is.” The Supervisor responded that Complainant’s claims of his aggression were fabricated and Complainant “was not the first employee to accuse me of those allegations. Some have even falsely accused me of doing it in front of a full classroom, but they were the only ones that noticed it. I feel [Complainant] has collaborated with those same false accusers. I’ve brought these concerns to my supervisor and prior BJACH Leadership.” The Supervisor also asserted that Complainant avoids one-on-one conversations with him and “when we do have those sessions, [Complainant] is constantly taking notes . . . Most of our conversations are initiated by me or a third party. I’m really not sure why [Complainant] has that perception because he has never shared it with me.”

The Chief testified that he does not believe the supervisor displayed aggressive verbal and body language towards anyone. However, the Chief stated that he and the Supervisor “both have pointed fingers in conversation. We have specifically noticed that [ML] does not like this, and have tried our best to refrain from doing so. I have had more than one employee tell me [the supervisor] shouted at times. Sometimes, I was actually a party to the conversation. Sometimes, I overheard the conversation. Sometimes I did not hear the conversation.”

Based on our review of the record, as well as taking administrative note of the EEOC AJ’s decision in ML’s complaint, we find that the weight of the evidence indicates that the Supervisor did often respond to Complainant in an angry or aggressive manner. More likely than not, it appears that the Supervisor harbored retaliatory animus towards Complainant for his support of ML’s complaints. Of particular relevance, we note the Supervisor’s expression of hostility when he stated that he believed Complainant had “collaborated” with other “false accusers.” It also

appears that the Chief had at least some awareness of the Supervisor's conduct, but failed to do anything about it.

In sum, we conclude that Complainant has provided adequate evidence to support his claim that his management allowed a subordinate employee (Employee C), to act in an ongoing rude, disrespectful and bullying manner to towards him, which also served to undermine Complainant's authority as a Lead with other staff. Complainant and ML brought their claims of discriminatory harassment by Employee C to the attention of management, but the misconduct appears to have continued unchecked. Moreover, following his participation in the complaints brought by ML, Complainant was often treated in an angry and hostile manner by the Supervisor, who was again unchecked by the Chief. This evidence is sufficient to establish that Complainant was subjected to a hostile work environment tainted by retaliatory animus.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we REVERSE the Agency's final decision finding no violation of Title VII and REMAND the matter to the Agency for further processing in accordance with the ORDER below.

ORDER

The Agency is ordered to take the following remedial action:

1. Unless he expressly consents, Complainant shall no longer work in a supervisory chain involving the Supervisor. Complainant may be reassigned to a comparable position only with his consent.
2. The Agency is ordered to consider the issue of compensatory damages. Within ninety (90) calendar days of the date this decision is issued, the Agency shall conduct a supplemental investigation on the issue of compensatory damages. Complainant shall cooperate with Agency efforts, and shall provide all relevant information which the Agency requests. No later than sixty (60) calendar days after Agency receipt of Complainant's submissions, the Agency shall issue a final decision on the compensatory damages issue with appeal rights to this Commission. If there is a dispute regarding the exact amount, the Agency shall issue a check to Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of any disputed amount. The petition for enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. The Agency shall restore any annual or sick leave used by Complainant established to have resulted from the hostile work environment.

4. Within 60 days of the date this decision becomes final, the Agency shall provide eight (8) hours of in-person interactive EEO training to the Supervisor and the Chief, with a special emphasis on the prohibition of discriminatory harassment and retaliatory actions.
5. Within 60 days of the date this decision becomes final, the Agency shall consider taking disciplinary action against Employee C and the responsible management officials. The Agency shall report its decision. If the Agency decided to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set for the reason(s) for not doing so.
6. The Agency shall post a notice in accordance with the paragraph below entitled "Posting Order."

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

POSTING ORDER (G0914)

The Agency is ordered to post at its Integrated Disability Evaluation System, Bayne-Jones Army Community Hospital, U.S. Army Medical Command in Fort Polk, Louisiana, with copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted in hard copy and electronic format by the Agency within 30 calendar days of the date this decision becomes final, 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 at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period.

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 (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's final

report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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 25, 2019

Date