



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

[REDACTED]
Roy F.,
Complainant,

v.

Thomas E. Price, M.D.,
Secretary,
Department of Health and Human Services,
Agency.

Appeal No. 0720170018

Hearing No. 410-2015-00263X

Agency No. HHS-CMS-0432-2014

DECISION

Following its December 8, 2016, final order, the Agency filed an appeal pursuant to 29 C.F.R. §1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an Equal Employment Opportunity Commission Administrative Judge's (AJ) finding of 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 REVERSES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a GS-15 Senior Policy Advisor, Health Insurance Specialist in the Agency's Atlanta Regional Office's Financial Management Group (FMG) at the Center for Medicaid and CHIP Services facility in Atlanta, Georgia. In this capacity, Complainant also served as FMG's National Technical Director responsible for serving as a liaison between FMG's Central Office, and the 10 regional offices for the financial oversight of the Medicaid program. His duties included creating and issuing national standard operating procedures, working with external auditors, creating review guides for expenditure and budget reports, financial management reviews that are performed across the regions, and the yearly work plan.

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.

In November 2013, a supervisory accountant (CW) filed an EEO complaint against the Associate Regional Administrator (ARA) of the Atlanta Division of Medicaid and Children's Health Operations (ADMCHO), Consortium for Medicaid and Children's Health Operations (CMCHO). CW sought advice from Complainant about his work situation because Complainant had worked under the ARA and had previously held CW's position. CW told Complainant that he believed as the only male in the department, CW was being treated differently than the women employees and that the ARA did not like men who held different opinions. Complainant stated that he had held similar beliefs about the ARA when he was under her supervision and agreed to be a witness in CW's case (HHS-CMS 0040-2014). CW reported Complainant's statement to his EEO counselor who recorded Complainant's statement in his report. Additionally, CW mentioned Complainant's beliefs in his affidavit in support of his discrimination claim. In February 2014, the ARA filed a response to CW's allegations which mentioned Complainant's name.

The events underlying Complainant's retaliation claim are as follows. The Branch Manager of Atlanta Financial and Program Management Branch 1 (AFPMBI), ADMCHO, CMCHO, claimed that, on November 9, 2012, she sent an email to Complainant requesting an extension to complete the financial management review (FMR) for a Georgia nursing home because the report was due on July 13, 2013, and she knew she would not be able to complete it on time. The Branch Manager did not copy the ARA on the email as directed by internal practices and she was unable to produce a copy of the email. Further, Complainant testified that he did not receive this email and the Branch Manager never contacted him about his lack of responsiveness to it. On July 2, 2014, the Branch Manager and the ARA stated in the A-123 report that Complainant had failed to respond to the November 9, 2012 extension request.

On May 3, 2013, the Branch Manager emailed Complainant asking for an extension to complete the Georgia nursing home complaint. The Branch Manager's email was in response to Complainant's May 1, 2013 email to all 10 regions requesting a status update on outstanding FMRs. Complainant received the May 3, 2013 extension request and it was the first time he learned that an extension was needed on the Georgia FMR. Complainant said the May 3, 2013 email did not mention that it was a second request, what was the problem or schedule, and it did not propose a new due date. Complainant testified that when he saw the Branch Manager, he informed her that the May 3, 2013 email lacked an extension date. Complainant said that she claimed she forgot and would provide him with a date for the extension. Complainant said that he never received an extension date from her. The Branch Manager reported in the 2014 A-123 report that Complainant had failed to respond to her May 3, 2013 extension request.

The Branch Manager testified that on April 18, 2014, she contacted Complainant about his lack of responsiveness to her earlier requests for an extension to file the Georgia FMR. She stated that she had met with the auditors in April 2014, who informed her that she had a control deficiency regarding the Georgia FMR. She testified that after the auditor's meeting, she contacted Complainant about the audit findings and the need for an extension for the Georgia FMR. Complainant testified that he never acknowledged receipt of her emails and that he did not

receive a phone call from her in April 2014. The ARA and Branch Manager stated in the A-123 report that Complainant had acknowledged receipt of the emails.

On July 29, 2014, Complainant learned that the ARA and the Branch Manager allegedly reported false statements about him to an external auditor who published the inaccurate statements in the OMB Circular A-123 report.

The alleged false statements were that:

- (1) Complainant failed to respond to an email from the Branch Manager dated November 9, 2012;
- (2) Complainant failed to respond to an email from the Branch Manager dated May 3, 2013; and
- (3) Complainant was contacted by the Branch Manager, on April 18, 2014, regarding the Complainant's lack of responsiveness.

On December 5, 2014, Complainant filed an EEO complaint alleging that the Agency engaged in reprisal against him based on his participation as a witness in another employee's EEO matter in violation of Title VII. At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an AJ. On May 11, 2015, Complainant requested a hearing.

The AJ held a hearing on March 30, 2016. On September 29, 2016, the AJ issued a decision finding that the Agency discriminated against Complainant on the basis of reprisal for all three claims in the complaint. On October 24, 2016, the AJ awarded Complainant \$8,000 in nonpecuniary, compensatory damages and \$20,000 in attorney's fees. On December 8, 2016, the Agency issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected him to reprisal.

On appeal, the Agency seeks reversal of the AJ's decision. Complainant argues that the AJ's decision was proper.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the

testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

On appeal, the Agency argues Complainant did not establish a prima facie case of reprisal because the responsible officials were not aware that Complainant had engaged in protected activity at the time the A-123 Report was prepared since neither the ARA nor the Branch Manager is in his supervisory chain and none of the issues in the EEO case in which Complainant participated specifically mentioned or concerned Complainant. This argument lacks merit.

The EEO Counselor's report (for CW's complaint) indicated that CW had discussed his work situation with Complainant and that Complainant made statements to CW concerning ARA's discriminatory treatment of her male subordinates, which he reiterated as support for his sex discrimination claim. Further, the ARA and the Branch Manager were named in CW's EEO complaint and both were informed of CW's allegations of discrimination and reprisal when the EEO Counselor asked them to provide responses. Finally, Complainant's name appeared in CW's affidavit which was shared with the ARA. We find substantial evidence supports the AJ's finding that Complainant established a prima facie case of retaliation.

Next, the Agency argues that the AJ erred in that Complainant established that the Agency's nondiscriminatory reason for entering the information in the OMB report, i.e., that the statements were true, was a pretext for discrimination. We find that the AJ's finding of reprisal is supported by substantial evidence in the record. Although the ARA and Branch Manager insist that the Branch Manager emailed requests to Complainant on November 9, 2012, and May 3, 2013, seeking an extension to complete a financial management review report about a nursing home in Georgia and Complainant failed to respond to them, evidence in the record disputes their version of the events. Complainant testified that he did not receive the November 9, 2012 request, and the Branch Manager was unable to produce a copy of the November 9, 2012 email. Further, the Branch Manager did not produce any evidence that she provided an extension date with respect to the May 3, 2013 email request for an extension, she did not mention it was a second request concerning the Georgia FMR, and she made no attempt to follow up with Complainant when she did not receive a response.

The Agency also argues that the AJ's decision should be reversed because Complainant failed to establish that he is an aggrieved employee. The Agency argues that, despite the 2014 A-123 report, Complainant has received positive performance evaluations and has not suffered a loss in pay or reduction in any other term or condition of his employment. Complainant's immediate supervisor stated that Complainant did not suffer any repercussions from FMG. We find Complainant is aggrieved because the actions at issue in this complaint were reasonably likely to deter a reasonable employee from engaging in protected activity. See Charlie K. v. Equal Employment Opportunity Commission, EEOC Appeal No. 0120142315 (Jan. 24, 2017) (citing Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006)).

Neither party has challenged the remedies ordered by the AJ and we shall restate those remedies in our Order and add the remedies of consideration of discipline, EEO training, and a posting of a notice of the finding of discrimination.

CONCLUSION

The Agency's final decision is REVERSED and we REMAND the matter to the Agency for compliance with the Order herein.

ORDER

To the extent it has not already done so, the Agency shall take the following remedial actions:

- I. Within 60 days of the date this decision is issued, the Agency shall pay \$8,000 in nonpecuniary, compensatory damages to Complainant.
- II. Within 60 days of the date this decision is issued, the Agency shall pay \$20,000 in attorney's fees to Complainant.
- III. Within 90 days of the date this decision is issued, the Agency shall provide a minimum of eight (8) hours of in-person or interactive training for the Branch Manager and the ARA about their responsibilities under EEO law with an emphasis on retaliation law.
- IV. Within 60 days of the date this decision is issued, the Agency shall consider disciplining the Branch Manager and the ARA for retaliating against Complainant. The Agency shall report its decision to the Commission. If the Agency decides to take disciplinary action, then it shall identify the action taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline.

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 (G1016)

The Agency is ordered to post at its Atlanta Regional Office's Financial Management Group, Center for Medicaid and CHIP Services facility in Atlanta, Georgia 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 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 (H0900)

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 (K0610)

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 submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's 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 (M0416)

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 or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. 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. The requests 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 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)

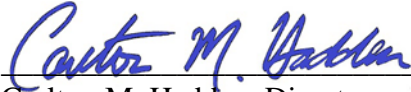
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this 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 (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c).

The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above (“Right to File a Civil Action”).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

June 6, 2017

Date