



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

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Johana S.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 0120182005

Hearing No. 450-2016-00079X

Agency No. 1G-756-0012-13

**DECISION**

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 26, 2018, final order 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. For the following reasons, the Commission VACATES the Agency's final order and REMANDS the matter.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Supervisor, Distribution Operations, EAS-17, at the Agency's Network Distribution Center facility in Dallas, Texas. On February 20, 2013, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of her sex (female) and in reprisal for prior protected EEO activity when on November 27, 2012, management subjected her to a hostile work environment and removed her from her work area.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> The Agency initially issued a final decision finding no discrimination, dated August 29, 2013, that was affirmed by the Commission on appeal. See Complainant v. U.S. Postal Service, EEOC

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The AJ assigned to the case found that a decision without a hearing was appropriate as there were no genuine issues of material fact in dispute. The AJ issued a decision without a hearing on April 12, 2018, finding no discrimination. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. On appeal, Complainant argues that the AJ erred in issuing a decision without a hearing as there are genuine issues of material fact that require a hearing. Complainant further argues that the statements of management officials are not worthy of belief and reiterates her contention that the Agency subjected her to unlawful harassment.<sup>3</sup>

### ANALYSIS AND FINDINGS

Here, we must determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for 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 "material" fact has the potential to affect the outcome of a case.

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Appeal No. 0120133341 (Apr. 1, 2015). Complainant subsequently requested reconsideration, and the Commission granted the request, finding that Complainant was denied the opportunity to participate in the investigation because she was deployed with the Air National Guard from February 19 through August 3, 2013. We found that the Agency should have held the case in abeyance until her return, and we remanded the case for further processing. See Complainant v U.S. Postal Service, EEOC Request No. 0520150345 (Sep. 4, 2015).

<sup>3</sup> In its brief in opposition to appeal, the Agency contends that the instant complaint does not include harassment on the basis of sex because Complainant did not raise the basis in her formal complaint. We find, however, that the AJ identified Complainant's claim as harassment on the bases of sex and reprisal and included these bases in both her notice of intent to issue summary judgment and in her subsequent decision. As such, we find that the claims and bases at issue are as identified above.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Issuing a decision without holding a hearing is not appropriate for a case that can only be resolved by weighing conflicting evidence. If the non-moving party “has not had the opportunity to discover information that is essential to his opposition,” then a decision without a hearing is inappropriate. Anderson, 477 U.S. at 250. The AJ must enable the non-moving party to engage in sufficient discovery to respond to a motion for a decision without a hearing.

In the instant case, we find that the AJ failed to view the evidence in a light most favorable to Complainant and improperly determined that there are no genuine issues of material fact that merited a hearing. We further find that the AJ made improper credibility determinations. Specifically, Complainant alleges that on November 27, 2012, she was assigned to supervise the drop shipment area of her facility, when a contract driver arrived with a shipment of mail that was improperly loaded. Complainant states that when she informed the driver that the shipment would not be accepted because it posed a safety risk to her staff, he became angry, entered a restricted area, and threatened her. Complainant states that she radioed for assistance, and the Acting Lead Manager, Distribution Operations (M1), as well as several other managers and postal police officers responded to her request. Following this incident, Complainant states that she left work for the remainder of the day and remained off for two additional days. When she returned to duty, M1 reassigned her from the drop shipment area to “one of the areas where parcels are keyed, sorted, and dispatched” so that she would no longer have any interaction with contract drivers or members of the public. Complainant states that she considered this to be a reassignment to a less desirable location.

In her decision, the AJ concluded that the driver “was simply attempting to deliver a load to the Agency and was inquiring why he was being sent away without accomplishing the job.” We note, however, that the record does not contain any statement from the driver. We further note that, although the AJ concluded that “it was Complainant’s obstructive behavior that resulted in interfering with the driver’s ability to deliver his load to the Agency” and that “witnesses were consistent in their testimony that the driver remained calm throughout the situation,” a number of witness statements directly contradict this finding and corroborate Complainant’s version of the incident. Specifically, one witness stated that “the driver got very angry and followed [Complainant] into her personal space, as if he was going to harm her.” Another witness stated that the driver was “very unruly” and “went berserk, ranting, raving, cursing and screaming” before threatening Complainant “very loudly and aggressively.” A third witness stated that the driver “got loud and angry” and that the “situation was hostile and unsafe for all employees.” A fourth witness stated that the driver was “abusive, loud, and threatening” and that Complainant “told him to ‘back off’ twice but [he] still would not move back.”

Additionally, M1 states in her affidavit that the reason she reassigned Complainant out of the drop shipment area was because “it was apparent that she was not of the appropriate mindset or demeanor at that time of dealing with customers.” M1 further states that Complainant acted “unprofessionally and improperly.”

The record shows that M1 did not witness the alleged harassing incident with the driver but states that she investigated the matter and relied on the statements of witnesses in making her determination. It is clear, however, that M1's contention that "nothing in any of the statements or what the other managers on the scene identified personally could verify that he was hostile" is not supported by the evidence. We find that, because M1's stated reasons for her investigative conclusion and her decision to reassign Complainant are directly contradicted by evidence in the record, this raises both a credibility issue and issues of material fact that require a hearing and strident cross-examination.

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). We find that a hearing is necessary to resolve these issues of material fact and to make a credibility determination with regard to M1's testimony.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that a decision without a hearing was not proper; and VACATE the Agency's final order, and REMAND the case back to the Agency for further processing in accordance with the ORDER below.

### ORDER

The Agency shall submit to the Hearings Unit of the EEOC Dallas District Office a request for a hearing within 15 calendar days of the date this decision is issued. The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within 15 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 issue a decision 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 (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

**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

December 13, 2019

Date