



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

██████████
Francine M.,¹
Complainant,

v.

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

Appeal No. 0120180519

Agency No. 4J-604-0070-17

DECISION

On November 20, 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 October 12, 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 MODIFIES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether Complainant has shown by a preponderance of the evidence that the Agency subjected her to an unlawful hostile work environment.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Part-Time Flexible (PTF) Sales, Service and Distribution Associate at the Agency's Minooka, Illinois Post Office. Complainant believed that she was being singled out by the Postmaster (Caucasian, White, aware of Complainant's physical disability).

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.

She asserted that the Postmaster would only call the Black clerks to a meeting. She claimed that she and her coworker (Coworker1) (African-American, Black) were singled out while another coworker (Coworker2) (Caucasian, White) was not asked to be included in meetings.

Complainant indicated that, on November 15, 2016, she went to speak with the Postmaster regarding her paycheck, which was incorrect for the second straight pay period. She asserted that the Postmaster stated to her, "You never did shit since the day you started," "Go back to where the hell you came from," and "I'm sick of you people."

The Postmaster claimed she was sitting at her desk when Complainant walked up to her and asked about her paycheck. The Postmaster contended that it was Complainant who grew louder and cursed at her, making her feel threatened to the point that the Postmaster felt she was "going to have a F----- (sic) heart attack." The Postmaster noted that a rural carrier (Coworker3) was present. Coworker3 noted that Complainant was the aggressor and that she was the one who used profanity towards the Postmaster. Coworker3 stated that he heard Complainant call out that "[the Postmaster is] not correcting this (back pay) because you don't like me (Complainant)," as she (Complainant) became more intense and emotional. Coworker3 also noted that Complainant has been at the facility for less than a year and she has had numerous issues or complaints with customers and coworkers regarding her behavior and work ethic. Coworker1, in contrast, stated that he witnessed the Postmaster belittling and cursing at Complainant.

On December 10, 2016, Complainant stated that the Postmaster showed her a postcard of an ugly dark brown monkey and said, "Do you get it?" and laughed in Complainant's face. Complainant asked, "What are you trying to say?" Complainant was offended and outraged by the incident and felt it was done as a racial gesture on the Postmaster's part. The Postmaster did not recall this event. Complainant did not provide any further information on this event beyond expressing that she found the image to be dehumanizing. Coworker1 stated that the postcard was a baby monkey with hair all over its face and body along with a customer's address. He recalled that the Postmaster asked if Complainant "got it" and Complainant told the Postmaster that it was not funny. There was no further information in the record on the image of the monkey or what was considered "funny" by the Postmaster.

On December 20, 2016, Complainant got confused and did not see a customer's package. She asked for assistance. The Postmaster went to the carrier's case and got down on the floor to locate the package. She returned to Complainant and asked her if she was dyslexic, in front of the customer. Complainant stated that she felt offended, humiliated, and belittled. The Postmaster observed that "[w]e all seem to transpose numbers sometimes."

On December 27, 2016, Complainant indicated that the Postmaster started yelling at her and "walked up to her face." She averred that the Postmaster stated that she (Complainant) was acting like a wild hooligan. The Postmaster denied calling her a "hooligan."

On February 2, 2017, Complainant said that the Postmaster yelled, "You didn't see the damn parcel" twice. Complainant asked the Postmaster not to curse at her.

The Postmaster recalled the event differently. She noted that she was short a clerk and did not get a chance to walk the floor. The Postmaster was able to check the floor later and saw parcels. She then called out to Complainant that she did not scan the “damn parcels” in the UCart and mumbled to herself as she left, “O (sic) brother.”

Complainant stated, that on February 16, 2017, she was on break in the lobby when the Postmaster opened the doors. She said, “Y’all on break at the same time. I got y’all.” Complainant stated that she walked up to the Postmaster and told the Postmaster that she had threatened her. Complainant noted that Coworker1 was present and witnessed the event. Complainant asserted that the Postmaster did not threaten Coworker2, who also left on break.

The Postmaster stated that Complainant did not accurately describe the event. The Postmaster stated was finishing reports when she got up and discovered all of her clerks were missing while a customer stood at the window. The Postmaster looked around the workroom floor calling for the clerks. She went through the doors to see if anyone was in the outer lobby. She saw Complainant and Coworker1 sitting at the writing table using their personal devices. She agreed that she shook her head and said, “I got ya now.” The Postmaster went in to tell the customer that she would be right back. She returned to the window and found Coworker2 waiting on the customer. The Postmaster explained that she had only three clerks and they knew that they should not all go on break at the same time.

On March 22, 2017, Complainant was contacted and given a pre-disciplinary interview. The Postmaster agreed that this event occurred, regarding attendance and tardiness issues with Complainant.

Complainant stated that, on March 30, 2017, the Postmaster yelled and approached her in a threatening manner. She stated that on that day, she went to another clerk who needed help. She believed that the Postmaster was antagonizing him. Complainant stated that the Postmaster saw her assisting the other clerk and looked at her angrily, in that she balled up her fist, her eyes became blood shot, and her breathing became very hard. Coworker1 and Coworker2 were present at the time.

Complainant stated that she then called the Manager of Post Office Operations (the Postmaster’s superior) to inform her that she (Complainant) believed the Postmaster acted in a threatening manner. According to Complainant, the Manager asked her if she was comfortable going back to work. Complainant stated that she was fine returning to work but wanted the Manager to know about the incident, and that the Postmaster would offer help to another employee but not her (Complainant). Again, according to Complainant, the Manager followed up with the Postmaster and instructed the Postmaster to mind her tone of voice and when she gives directions to employees.

The Postmaster denied Complainant’s account of this event. The Postmaster stated that she was trying to get help in the box mail section. Complainant went over and started helping with the parcels.

The Postmaster said that the parcels were almost done, and the box mail needed to be put in. The Postmaster called over to Complainant to come back over to the box section. The Postmaster noted that she herself could not physically handle the box mail section. The Postmaster interpreted Complainant's complaint to be about how the Postmaster would help Coworker2 and treated him more favorably.

Complainant contacted an EEO Counselor alleging that she had been subjected to harassment. On May 20, 2017, Complainant filed an EEO complaint alleging that the Agency subjected her to harassment on the bases of race (African American), color (dark brown), and disability (learning disability, carpal tunnel syndrome, tendonitis). In support of her claim, Complainant alleged that the following events occurred:

1. On dates to be specified, the Postmaster singled her out about her work performance;
2. On November 15, 2016, when Complainant informed the Postmaster that her paycheck was incorrect for the second straight pay period, the Postmaster cursed at her;
3. On December 10, 2016, the Postmaster showed her a postcard of an ugly monkey and Complainant believed it was a racial slur;
4. On December 20, 2016, the Postmaster asked her in front of a customer if she was dyslexic;
5. On December 27, 2016, she was sent home;
6. On February 2, 2017, the Postmaster swore at her;
7. On February 16, 2017, the Postmaster threatened her;
8. On March 22, 2017, she was given a pre-disciplinary interview (PDI); and
9. On March 30, 2017, the Postmaster yelled at her and approached her in a threatening manner.

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 EEOC Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). Therein, the Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

Complainant did not submit a statement or brief in support of her appeal.

The Agency submitted a statement reiterating its conclusion that Complainant failed to establish discrimination and that the incidents of which Complainant complains were not sufficiently severe or pervasive, either individually or collectively, to constitute a hostile work environment.

STANDARD OF REVIEW

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 (EEO MD-110), 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").

ANALYSIS AND FINDINGS

Claims 1-3 and 5-9 - Harassment

It is well-settled that harassment based on an individual's race and/or color are actionable. See Meritor Savings Bank FSB v. Vinson, 477 U.S. 57 (1986). In order to establish a claim of harassment under those bases, the complainant must show that: (1) she belongs to the statutorily protected classes; (2) she was subjected to unwelcome conduct related to her membership in those classes; (3) the harassment complained of was based on race and/or color; (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). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Sys. Inc., EEOC Notice No. 915.002 (March 8, 1994).

In events 1-3 and 5-9, Complainant alleged that she was subjected to events based on her race and color. As an initial matter, Complainant has established parts 1 and 2 of a prima facie case of harassment.

To establish part 3 of her prima facie case of harassment, Complainant argued that the Postmaster pointed to a postcard with the image of a baby monkey, as alleged in event 4, and that this constituted evidence of racial bias. The Commission has addressed the use of the word "monkey" and monkey references. See EEOC's Compliance Manual, Section 15 "Race and Color Discrimination", No. 915.003, 15-38 (Apr. 19, 2006) (a single incident of a racial comparison to an animal may create a hostile work environment); Sona B. v. Dep't of Veterans Aff., EEOC Appeal No. 0120180237 (Mar. 15, 2019) (addressed display of monkeys where Black employees felt display racist). As such, we have found that references to monkeys can be seen as racist. However, we do not find this to be the case here. We note that Complainant provided little context for the monkey postcard beyond stating that it was a "baby monkey" and the Postmaster said, "Do you get it?" From this description alone, we do not have enough information to find that Complainant has established the Postmaster's purported discriminatory animus based on the postcard event.

In event 2, Complainant also argued that the Postmaster's discriminatory bias expressed itself when she referred to Complainant and Coworker1 as "you people." We have observed that the use of the words "you people," while possibly understood as discriminatory, is "ambiguous." Cruz v. U.S. Postal Serv., EEOC Appeal No. 0120072249 (Aug. 2, 2007); Zoila P. v. U.S. Postal Serv., EEOC Appeal No. 0120170006 (Oct. 12, 2018)("you people" is a comment that is ambiguous and must be viewed within the context of the particular workplace at issue); Moster-Stein v. Dep't of Veterans Aff., EEOC Appeal No. 0120070651 (June 26, 2007)(assuming "you people" remark made by supervisor, no persuasive evidence of race or religious discrimination considering all the evidence).

However, the Postmaster did not admit to making the statement. Complainant averred that the event occurred. Complainant stated that Coworker3 witnessed the event. However, Coworker3 did not testify that the Postmaster used the phrase "you people." We have no other evidence to establish that the event occurred as Complainant asserted it happened. As Complainant did not request a hearing, we do not have the benefit of an Administrative Judge's credibility determinations after a hearing; therefore, we can only evaluate the facts based on the weight of the evidence presented to us. Therefore, based on our review of the record, we find that there is no persuasive evidence to show that the incident occurred because of Complainant's protected bases.

We now turn to part 4 of the prima face case of harassment. In events 1 and 5-9, Complainant raised events in which she and the Postmaster had conflicts in the workplace. Analyzing the record as a whole, we do not find sufficient evidence that any of these incidents, even if each occurred as alleged, were motivated by discriminatory animus which created a hostile work environment. The Commission recognizes that many of the claimed incidents of discrimination are not themselves actionable.

Further, we note that not every unpleasant or undesirable action which occurs in the workplace constitutes an EEO violation. See Shealey v. Equal Emp't Opportunity Comm'n, EEOC Appeal No. 0120070356 (Apr. 18, 2011) (citing Epps v. Dep't of Transp., EEOC Appeal No. 0120093688 (Dec. 19, 2009)). We have consistently held that the discrimination statutes are not general civility codes. Lassiter v. Dep't of the Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012) (personality conflicts, general workplace disputes, trivial slights and petty annoyances between a supervisor and a complainant do not rise to the level of harassment). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." Harris, 510 U.S., at 21, citing Meritor, 477 U.S., at 67. Moreover, ordinary managerial duties include assuring compliance with agency policy and procedures, monitoring subordinates, scheduling the workload, scrutinizing and evaluating performance, providing job-related advice and counsel, taking action in the face of performance shortcomings and to otherwise manage the workplace. Erika v. Dep't of Transportation, EEOC Appeal No. 0120151781 (June 16, 2017). The picture that emerges from the record is one of a personality conflict between Complainant and the Postmaster, evidenced by the actions and reactions of the two. As such, we conclude that Complainant has not shown that she was subjected to events which, taken as a whole, created an intimidating, hostile, or offensive work environment based on her protected groups.

Claim 4 – Medical Inquiry

We note that, in claim 4, Complainant stated that the Postmaster asked Complainant if she was dyslexic in front of a customer. Although Complainant raised this event in support of her claim of harassment, Complainant has alleged, in essence, that the Postmaster's question constitutes a claim of improper medical inquiry in violation of the Rehabilitation Act.

We note that the Rehabilitation Act does not limit the prohibitions against improper medical inquiries to individuals with disabilities. 29 C.F.R. § 1630.14(c). Rather, the Rehabilitation Act places certain limitations on an employer's ability to make disability-related inquiries or require medical examinations of all employees.

An employer may pose an inquiry or require medical examination of an employee only if the examination is job-related and consisted with business necessity. Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA (July 27, 2000), at 5. This requirement is met when the employer has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform essential job functions is impaired by a medical condition; or (2) that an employee poses a direct threat due to a medical condition. Id. at 6-9. Objective evidence is reliable information, either directly observed or provided by a credible third party, that an employee may have or has a medical condition that will interfere with her ability to perform essential job functions or will result in a direct threat. Id. at 7. Where the employer forms such a belief, its disability-related job inquiries and medical examinations are job-related and consistent with business necessity. Id.; see Janise v. U.S. Postal Serv., EEOC Appeal No. 01A13359 (Sept. 19, 2002). The burden is on the Agency to show that one of the criteria justifying the inquiry or examination was met. Hampton v. U.S. Postal Serv., EEOC Appeal No. 01986308 (July 31, 2002).

The Postmaster averred that, on the date in question, Complainant could not locate a parcel for a customer. When the Postmaster found the package, she asked Complainant if she were dyslexic. The Postmaster also noted, "We all seem to transpose numbers sometimes."

The Postmaster asked Complainant if she had a medical condition, i.e., dyslexia. The Postmaster provided no evidence to indicate that her medical inquiry was job-related and consistent with business necessity. The Postmaster failed to indicate that she had a belief that Complainant's ability to perform her essential functions was impaired or that Complainant posed a direct threat, nor did the Agency provide any such evidence through other means. Accordingly, we conclude that the Postmaster violated the Rehabilitation Act when she asked Complainant whether she was dyslexic.

CONCLUSION

We find that Complainant established that the Agency violated the Rehabilitation Act with respect to claim 4. However, she failed to show by a preponderance of the evidence that, more likely than not, the Agency subjected her to harassment based on her race and/or color.

Therefore, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final decision and REMAND the matter for further processing accordance with the ORDER below.

ORDER (C0610)

The Agency is ordered to take the following remedial action:

- I. The Agency shall conduct a supplemental investigation on compensatory damages, including providing Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages. Thereafter, within ninety (90) calendar days of the date this decision is issued, the Agency shall determine the amount of compensatory damages to be awarded. Within thirty (30) days of determining the amount of compensatory damages, the Agency shall pay Complainant the compensatory damages.
- II. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive training to the identified responsible management officials regarding their responsibilities with respect to eliminating discrimination in the federal workplace. The training must emphasize the Agency's obligations under Section 501 of the Rehabilitation Act, particularly its duties regarding medical exams and inquiries and medical confidentiality.
- III. Within thirty (30) calendar days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the responsible management officials. The Commission does not consider training to be disciplinary. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s)
- IV. The Agency shall post a notice in accordance with the paragraph 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 (G0617)

The Agency is ordered to post at its Minooka, Illinois Post Office 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).

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 CFR § 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 (T0610)


This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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 5, 2020
Date