



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

[REDACTED]
Ebony M.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service,
Agency.

Appeal No. 2019001771

Agency No. 4G-320-0024-18

DECISION

On November 21, 2018, 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 24, 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq. Our review is de novo. For the following reasons, the Commission MODIFIES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisor, Customer Services, EAS-17, at the Agency's Post Office in Thomson, Georgia.

On February 28, 2018, Complainant filed an EEO complaint wherein she claimed that the Agency discriminated against her and subjected her to a hostile work environment on the bases of her race (African-American), sex (female), disability (ankle, shoulders) and her genetic information (daughter's Attention Deficit/Hyperactivity Disorder (ADHD)) when:

1. From April-October 2017, Complainant has not been paid properly for work hours;

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.

2. Around April 2017, Complainant's medical information has been disclosed to coworkers;
3. Since April 2017, Complainant's Supervisor (S1) would not accept her leave slips in which she was requesting leave to attend therapy sessions;
4. From April-October 2017, Complainant was not paid for higher level work;
5. From April-October 2017, Complainant has been required to deliver Express Mail;
6. On May 13, 2017 and August 5, 2017, S1 sent Complainant harassing text messages on her off days;
7. Before December 2, 2017, Complainant's access keys to the facility were taken away;
8. On December 1, 2017, Complainant's access code to the facility's alarm system was revoked;
9. In December 2017, Complainant was accused of selling sex toys at her work facility;
10. On December 4, 2017, S1 attempted to force Complainant to use eight hours of annual leave; and
11. On December 6, 2017, Complainant's access to programs needed to perform her duties was revoked.

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). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). Therein, the Agency determined that Complainant failed to prove that she was subjected to discrimination as alleged.

With regard to claims (1) and (4), Complainant listed 23 dates where she served in S1's position while S1 was away. Complainant stated that she should have been paid at a higher level. As for claim (2), Complainant argued that S1 disclosed her medical information to coworkers and stated on numerous occasions in front of others that she would not have hired Complainant, but that she was hired by the District, and that she was lazy and had mental issues. One of Complainant's coworkers stated that she heard S1 say multiple times on the workroom floor that she would not have hired Complainant if she knew that she was in physical therapy for her foot.

Another co-worker stated that she heard S1 say she would not hire someone who was lazy, and that Complainant had a foot injury. Several other coworkers indicated that they heard S1 say she would not have hired Complainant and that she is lazy.

In terms of claim (3), Complainant claimed that S1 disapproved her leave slips to attend therapy sessions. With respect to claim (5), Complainant maintained that on every day from the start of April 2017 through December 2, 2017, S1 required her to deliver express mail. As for claim (6), Complainant asserted that on May 13, 2017, S1 sent her a text message indicating that she left her job undone. According to Complainant, on August 5, 2017, S1 sent her a text message indicating that her employees do not respect her.

With regard to claim (7), the Agency stated that Complainant claimed that S1 took away her keys to the facility to make an example of her for leaving. In terms of claim (8), Complainant argued that S1 revoked her access code to the facility's alarm system. As for claim (9), Complainant asserted that after an Acting Supervisor filed an EEO complaint, S1 accused Complainant of selling sex toys at work. With respect to claim (10), Complainant claimed S1 with attempting to force her to use eight hours of annual leave in an effort to get her to exhaust her leave. As for claim (11), Complainant lost access to 23 programs at the Thomson facility. Complainant stated that she needed access to some of these programs to perform her duties.

Initially the Agency dismissed Complainant's claim under the Genetic Information Nondiscrimination Act of 2008 based on its determination that Complainant was not covered under the Act. According to the Agency, S1 denied having knowledge of Complainant's genetic information or that of her family members.

Assuming *arguendo* Complainant had set forth a *prima facie* case of discrimination under the remaining bases, the Agency determined that it articulated a legitimate, nondiscriminatory explanation for its actions. With respect to claims (1) and (4), S1 stated that Complainant was properly paid on the dates in question as an EAS-17 supervisor, which was her position. S1 asserted that Complainant was not entitled to EAS-20 pay because she was not detailed to work in that status. With respect to claim (2), S1 denied saying that she would not have hired Complainant if she knew she was in physical therapy. According to S1, she had a conversation with an employee where they discussed having heard from employees at Complainant's prior office that Complainant was lazy and incompetent. S1 acknowledged that the conversation occurred on the workroom floor but denied saying that Complainant was lazy or had mental issues.

In terms of claim (3), S1 maintained that Complainant did not disclose information about her prior medical issue, but that once Complainant presented appointment cards, she learned that Complainant did not have an accepted injury compensation claim and was not entitled to take appointments on the clock. According to S1, she nonetheless allowed Complainant to attend all appointments and that all her leave slips were accepted.

As for claim (5), S1 acknowledged that Complainant had been required to deliver Express Mail, per Agency policy. S1 stated that delivering Express Mail is part of a supervisor's duties.

In terms of claim (6), S1 denied sending harassing text messages to Complainant. S1 explained that on August 5, 2017, she sent a message after Complainant left the office stating that supervisors are responsible for ensuring that all vehicles are available and in operable working order, which Complainant failed to do. The Agency stated that in another text message, S1 indicated it was unacceptable the way Complainant left the office the previous night. The Agency noted that the message stated Complainant should not have left a 204B Acting Supervisor in that position and should have canceled her non-emergency leave. S1 further stated in the message that this is the reason the employees do not trust Complainant.

With respect to claims (7), (8), and (11), S1 asserted that these actions were taken based on Complainant leaving the facility for an extended detail assignment at another location. S1 explained that Complainant no longer required access to the Thomson facility or its data, and that she was following Agency policies.

As to claim (9), S1 stated that Complainant brought in a sex toy magazine after they discussed a wild party Complainant had attended. S1 stated that she told Complainant to remove the magazine from the facility immediately. S1 asserted that she subsequently learned that Complainant approached another employee about buying sex toys from the magazine. The Agency noted that a coworker provided a signed statement wherein she indicated that Complainant asked her on the workroom floor if she wanted to look at the magazine to see if she wanted to buy anything.

With regard to claim (10), the Agency stated that S1 claimed she was unfamiliar with a December 4, 2017 incident where she allegedly attempted to force Complainant to use eight hours of annual leave. The Agency noted that Complainant was unable to clearly articulate what occurred on December 4, 2017.

The Agency concluded that Complainant failed to show that management's reasons for its actions were pretextual. The Agency noted that the record contained statements from four witnesses who supported Complainant's contention that S1 uttered comments about her being lazy and about her need for physical therapy. The Agency stated that only one of the four witnesses' statements was signed. The Agency maintained that the conversation was precipitated not by S1, but by the other employee who asked her if she heard about Complainant being lazy and incompetent. The Agency acknowledged that S1's response was unnecessary and ill-advised but concluded that no evidence was presented that it was based on Complainant's race, sex, or disability. The Agency determined that Complainant failed to demonstrate that the relevant remarks were uttered based on Complainant's membership in the relevant protected groups.

The Agency concluded that Complainant failed to show that the alleged incidents were based on discriminatory or retaliatory animus. Further, the Agency determined that the conduct at issue was insufficiently severe or pervasive to establish a hostile work environment. As a result, the Agency found that Complainant was not subjected to discrimination or a hostile work environment as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that S1 called her lazy to her face on the workroom floor. Complainant states that she was not paid for higher level work and she should have been paid for the work she performed. Complainant maintains that delivering Express Mail is a craft function, not a supervisor function. Complainant argues that S1 is lying about the sex toy incident. Accordingly, Complainant requests that the Commission reverse the final decision.

ANALYSIS AND FINDINGS

Genetic Information Claim

As an initial matter, we note that Complainant claimed discrimination based on genetic information in violation of Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff et seq., which prohibits employers from discriminating against any employee because of genetic information with respect to the employee. 29 C.F.R. § 1635.1. Genetic information means information about (i) an individual's genetic tests or the genetic tests of that individual's family members; (ii) the manifestation of a disease or disorder in family members of such individual (family medical history); (iii) requests for and receipt of genetic services by an individual or a family member; and (iv) a fetus carried by an individual or family member or of an embryo legally held by the individual or family member. 29 C.F.R. § 1635.3(c).

Complainant claimed that she informed S1 that her daughter has ADHD and has been acting out at school. Complainant stated that she told S1 of her daughter's situation in case she had to leave work to handle her daughter's issues. S1 denied that she was aware of any genetic information concerning Complainant or her family members. Complainant's complaint is devoid of any allegations or facts regarding genetic tests, the genetic tests of her family members, or her family medical history. As a result, the Commission finds that the Agency properly found that Complainant did not make out a prima facie case of discrimination based on genetic information. See Ward B. v. U.S. Postal Serv., EEOC Appeal No. 0120180526 (Apr. 23, 2019).

Hostile Work Environment

To establish a claim of harassment Complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected classes; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment 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). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Therefore, to prove her harassment claim, Complainant must establish that she 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 a protected basis. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself.

The Commission finds that the alleged incidents were not sufficiently severe or pervasive to establish a hostile work environment. Even assuming that the alleged conduct was sufficiently severe or pervasive to create a hostile work environment, the Commission finds that Complainant failed to show that the Agency's actions were based on discriminatory animus.

The record reflects that the alleged incidents were more likely the result of routine supervision, personality conflicts, and general workplace disputes and tribulations. For example, as to claims (1) and (4), the Agency asserted that Complainant was not entitled to EAS-20 pay because she was not detailed to work in that status. In terms of claim (3), the Agency stated that Complainant did not have an accepted injury compensation claim and was not entitled to take appointments on the clock. However, S1 permitted Complainant to attend all appointments and that all her leave slips were accepted. With respect to claim (5), the Agency maintained that management officials can be required to deliver Express Mail. With regard to claim (6), the Agency pointed out that S1 informed Complainant through the text messages that supervisors are responsible for ensuring that all vehicles are available and in operable working order, which Complainant failed to do, and that it was unacceptable the way Complainant left the office the previous night.

As for claims (7), (8), and (11), S1 followed established policy concerning employees who leave an office due to a change in assignment by revoking Complainant's access to the burglar alarm system, and also by revoking her access to keys and data systems at the Thomson facility. With respect to claim (9), S1 asserted that Complainant approached an employee about buying sex toys from a sex toy magazine and a coworker provided a signed statement wherein she stated that Complainant asked her on the workroom floor if she wanted to look at the magazine to see if she wanted to buy anything. With regard to claim (10), S1 denied that she attempted to force Complainant to use eight hours of annual leave.

Finally, the Commission notes that the record indicates that S1 made several comments about Complainant being lazy. The Commission notes that the Commission's anti-discrimination statutes are not a civility code. Rather, it forbids “only behavior so objectively offensive as to alter the conditions of the victim's employment.” Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998). While S1's comments were unprofessional and inappropriate, there is insufficient evidence that they were based on Complainant's protected classes.

The Commission finds that Complainant has not shown that she was subjected to a discriminatory hostile work environment. Moreover, to the extent Complainant claims that she was subjected to disparate treatment, the Commission finds that, as discussed above, Complainant has not proffered any evidence from which a reasonable fact finder could conclude that the Agency's explanation

for its actions was pretext for discrimination. As a result, the Commission finds that Complainant was not subjected to discrimination or a hostile work environment as alleged.

Disclosure of Confidential Medical Information

Finally, with regard to Complainant's claim that S1 disclosed her confidential medical information to others, the Commission notes that the Americans with Disabilities Act of 1990 (ADA) requires employers to treat as confidential medical records all information obtained regarding the medical condition or history of an employee. 42 U.S.C. §§ 12112(d)(3)(B), 4(c); 29 C.F.R. § 1630.14(b)(1). Such information includes any medical information voluntarily disclosed by an employee. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, EEOC No. 916.002. General principles section in Background discussion (July 27, 2000). Improper Agency disclosure of such medical information constitutes a per se violation of the Rehabilitation Act. Valle v. U.S. Postal Serv., EEOC Request No. 05960585 (Sept. 5, 1997). This is true even if the complainant does not have a disability. Young v. U.S. Postal Serv., EEOC Appeal No. 0120112626 (Oct. 3, 2011). We note that an exception to the confidentiality requirement exists when supervisors and managers need to be informed of necessary restrictions on the work duties of the employee or that an accommodation is necessary.

In the instant matter, the record contains a signed statement from one of Complainant's coworkers that states she overheard S1 say "If I knew [Complainant] was in physical therapy for her foot I wouldn't have hired her." The coworker further stated that S1 uttered this statement multiple times on the workroom floor when Complainant first started working at the Thomson facility. Another coworker in an unsigned statement asserted that he witnessed S1 state on the workroom floor that Complainant had a foot injury. In her affidavit, S1 stated that Complainant revealed her medical information about her ankle to coworkers. S1 denied making the statement referenced in the coworker's signed statement but acknowledged that she was asked about Complainant's ankle and responded. We find that Complainant has presented sufficient evidence demonstrating that S1 impermissibly disclosed information about her medical condition to unauthorized persons. Thus, we find that the Agency violated the Rehabilitation Act.

CONCLUSION

The Agency's determination that no discrimination occurred is AFFIRMED with regard to claims (1) and (3) – (11). The Agency's determination regarding claim (2) is REVERSED as the Agency violated the Rehabilitation Act by disclosing Complainant's confidential medical information. The matter is REMANDED for compliance with this decision and the Order below.

ORDER

The Agency is ORDERED to take the following actions:

1. Within 120 days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages as a result of harm caused by divulging Complainant's medical information. The Agency shall afford Complainant an opportunity to establish a causal relationship between the disclosure and pecuniary or non-pecuniary losses. Complainant shall cooperate in the Agency's efforts to compute the amount of compensatory damages she is entitled to and shall provide relevant information requested by the Agency. The Agency shall issue a new Agency decision awarding compensatory damages to Complainant within 60 calendar days after the date this decision is issued. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth below.
2. Within 90 days of the date this decision is issued, the Agency shall provide a minimum of eight hours of training to S1 regarding her responsibilities under the Rehabilitation Act, placing a special emphasis on the Agency's obligation not to divulge employees' medical information in a manner inconsistent with that allowed by the Rehabilitation Act.
3. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against S1. The Commission does not consider training to be disciplinary action. 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 S1 has left the Agency's employ, the Agency shall furnish documentation of her departure date.

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 all of the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Thomson, Georgia 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).

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 (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 filed 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 12, 2020
Date