



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

[REDACTED]
Mitzie W.,¹
Complainant,

v.

Richard V. Spencer,
Secretary,
Department of the Navy,
Agency.

Appeal No. 2019001915

Agency No. 176238102782

DECISION

On December 7, 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 November 7, 2018 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. For the following reasons, the Commission REVERSES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was a Civil Service Mariner (CIVMAR) employed with the Military Sealift Command (MSC) as an Assistant Storekeeper, WM-9994-15, aboard the U.S. Navy Ship (USNS) Wally Schirra of the Norfolk Naval Base in Virginia. On November 16, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of reprisal (prior protected EEO activity) when her second-level (S2) and fourth-level (CPT) supervisors changed her performance evaluation from "Outstanding" to "Excellent" after she complained to them about an Abled Bodied Seaman (AB) stalking and harassing her, and of him breaking into her state room several times beginning on February 21, 2017, while she was asleep onboard ship

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.

After 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. 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). The decision concluded that Complainant failed to prove that the Agency subjected her to reprisal as alleged.

FACTUAL BACKGROUND

The Agency acknowledged that Complainant has filed eight EEO complaints alleging reprisal since 2011. Additionally, the Agency's acknowledged that Complainant engaged in protected activity when she reported her allegations of harassment against AB in April and May 2017. S2 testified that he was in the room (as "a listener") when Complainant raised this harassment complaint to the Captain (CPT).

The record reflects that on March 24, 2017, Complainant received a rating of "Outstanding" on a special performance evaluation for the period December 11, 2016 through March 24, 2017 (EVAL 1). S2 signed the evaluation and commented as follows:

This is a special evaluation for [Complainant] under my supervision between 12/11/2016 - 03/24/2017 while deployed 7th fleet onboard USNS WALLY SCHIRRA. Assigned for a short duration as COSAL Storekeeper, she performed her duties and responsibilities in issuing, receiving, inventorying, stowing, organizing and processing receipts of incoming and outgoing materials with good results. Admittedly, working in Supply Support Office for the first time, [Complainant] demonstrated affable personality and great enthusiasm in providing Customer Service daily. Assigned as Govt Purchase Card (GPC) storekeeper, she performed the position ably with modest supervision.

Accomplishments:

- Processed GPC material requests and monthly GPC reconciliation in a timely manner with minimal supervision
- Volunteered as Ship's NEX Operator, she took over the operation with significant interest and enormous fashion to provide Mariners with excellent service daily. Without regard for assistance, she processed ordering, receipt accounting, merchandise organizing and stowing independently.
- Teamplayer, she availed to assist and processed other requirement in Travel, Port Services, ShipClip Program processing and COSAL research fairly well to contribute, in particular, to the overall success of Supply Support Office administration.

With progressive training, hands-on experience and pursuit for accomplishments, [Complainant's] potential to achieve is an indicative of an excellent Storekeeper. [Complainant's] strong motivation for knowledge in Supply Logistics Operations

and willingness to accept higher responsibilities, is therefore recommended for advancement to YNSK² on the next available opportunity.

On June 6, 2017, Complainant received a rating of “Excellent” on a separate detachment performance evaluation for the period December 11, 2016 through June 6, 2017 (EVAL 2). S2’s comments in EVAL 2 are as follows:

[Complainant] was assigned to Cargo Supply when she reported on board Wally Schirra. Tasks that are routinely assigned to [Complainant] during her tour aboard the Wally Schirra was a Basic Storekeeper and She is not ready for higher responsibility as of yet, [Complainant] is still on the learning stage. During in port cargo replenishment, she is one that is assign of identifying each type of cargo commodity and ensuring that sticking color code and commodity labels for each ship are correct while counting the pallets. Conduct different types of inventory for Cargo and End-Use, Process material receipts, physically receive, segregate, stow cargo in locations, break-out cargo requirements for issue to customers with extreme supervision.

[Complainant] is slow learner and doesn't know how to create a shipping document (DD1149), She shows nothing but a negative attitude rudeness and don't even recognize the Supply Officer at work, She's the type of person who does what she wants and spend more time on her room than working spaces and *threats the supervisor of EEO*. But there is one thing she's good at; She Volunteered to manage the Ship Store aboard Wally Schirra. Highly recommended to attend more Storekeeper Training Schools. [emphasis added]³

S2 testified that EVAL 1 was created as a favor to Complainant to help her get promoted to Yeoman Storekeeper and to help motivate her to improve. However, S1 asserted that EVAL 2’s comments were “exactly who she is from day one.” S2 stated that EVAL 2 reflects the true state of Complainant’s performance and denied that EVAL 2 was motivated by retaliatory animus. Complainant’s first-line supervisor (S1) corroborated this assessment.

S2 also testified as to why he mentioned threats of EEO in his comments in EVAL 2 as follows:

When I show her this eval, she refused to sign her evaluation. And threatened me with an EEO and all of that, you know. I have to go EEO on this, blah-blah-blah. That's the reason why I put it on this, you know, on the evaluation comments that I am being threatened by EEO because a lot of the employees, I don't know,

² YNSK refers to Yeoman Storekeeper.

³ At some unknown point after issuance of EVAL 2, management asked the Career Advancement Specialist to delete the reference to threats of EEO in EVAL 2. Accordingly, the official copy in Complainant’s personnel file no longer contains this reference. However, Complainant has retained the original copy with the EEO reference that she received.

somewhere along the lines they always use the EEO as a shield. Okay. They always use EEO as a shield. I will report to EEO. I will report to EEO. That's all you been hearing from all these employees. Being a department head, you know, we are being threatened a lot of EEOs on board the ship. Oh, I'm going to report them to EEO. And, you know, that -- that's getting old, and I just don't know why are they using the EEO as a shield and threat left and right for EEO, EEO. It's always an EEO.

S2 further testified that he wrote in the comment about EEO *because* Complainant threatened him with EEO. S2 testified as follows:

When I did this evaluation, the detachment evaluation I -- yeah. I wrote in after -- that's what I said. After that she's been threatening me as an EEO. That's the reason I put it right here, but that's what was spent more time blah-blah-blah-blah-blah, and then threatens the supervisor of the EEO.

S2's provided additional information regarding his view of Complainant's protected EEO activity.

[EEO Investigator:] How often did the complainant complain to you or threaten you about going to or filing an EEO claim while she worked for you?

[S2:] She -- she only did it one time of me when she saw this evaluation, but she always tells everybody on board the ship that she's going to put me on EEO, report supply officer EEO, report the junior supply officer EEO. You know, she talks to everybody on board the ship and letting everyone in supply, just threatening junior supply officer⁴, myself as a supply officer, threatening as an EEO report.

[EEO Investigator:] Okay. And so is that why you placed that on her performance evaluation?

[S2:] Okay. The reason why I placed it or write this on the evaluation and comments here is to let the people there in the office and the EEO and -- I was really hoping that they see this one so they can know or they will learn that a lot of employees on board the ship out there in the ocean, that a lot of employees -- that's what I did -- is using the EEO as their shield. Okay. They're using it as a shield. EEO and EEO and EEO. And we just don't know why are these people doing that, you know. Why are these employees doing that to their department head or to their junior supply officer who are being threatened with EEO a lot of times?

So, I just want to let you guys know that a lot of people are using all of this -- you know, these stories, unbelievable stories just to make some money from the government.

⁴ S1 is the Junior Supply Officer.

Even this [Complainant], she was talking around the ship on board the ship that she is going to sue the government to make some money, then get out from MSC. Okay. Talking about that may be hearsay from my side because she didn't directly tell me that, but she was telling her coworkers and I just heard it from another coworker, just to let you guys know.

The undisputed record shows that Complainant was never counseled about her performance prior to the issuance of EVAL 2. The record contains a letter of counseling dated April 14, 2017 for reporting late to muster on two occasions. However, S2 does not mention this letter of counseling as a basis for his comments in EVAL 2.

ANALYSIS AND FINDINGS

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, 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”).

The federal employment discrimination laws depend on the willingness of employees and applicants to challenge discrimination without fear of punishment. Individuals rely on the statutory prohibitions against retaliation, also known as “reprisal,” when they complain to an employer about an alleged EEO violation, provide information as a witness in a company or agency investigation, or file a charge or complaint with the EEOC. Retaliation occurs when an employer takes a materially adverse action because an individual has engaged, or may engage, in activity in furtherance of the EEO laws the Commission enforces. See EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice 915.004 (Aug. 25, 2016) (Retaliation Guidance).

The Commission has a policy of considering reprisal claims with a broad view of coverage. See Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000). Under Commission policy, adverse actions need not qualify as “ultimate employment actions” or materially affect the terms and conditions of employment to constitute retaliation. Retaliation Guidance, (Aug. 25, 2016). The statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999).

In this case, Complainant engaged in EEO protected activity when she reported allegations of harassment against AB in April and May 2017 to CPT who advised Complainant to report it to EEO. The record also establishes that S2 believed Complainant intended to file EEO complaints against her supervisors. In addition, the record shows that S2 directly references Complainant's EEO activity as part of his negative commentary in EVAL 2.

We find that citing Complainant's protected EEO activity in her performance review is direct evidence of reprisal. Direct evidence of a retaliatory motive is any written or verbal statement by an Agency official that he or she undertook the challenged action because the employee engaged in protected activity. Such evidence also includes a written or oral statement by an Agency official that on its face demonstrates a bias toward the employee based on his or her protected activity, along with evidence linking that bias to the adverse action. Feder v. Dep't of Justice EEOC Appeal No. 0720110014 (July 19, 2012), req. for recon. den'd, EEOC Request No. 0520130004 (May 14, 2013); Rigoberto A. v. Evtl. Prot. Agency, EEOC Appeal No. 0120180363 (Sept. 17, 2019). S2 clearly demonstrated bias toward Complainant based on her protected activity by linking it to her negative performance rating as one of several performance deficiencies. Accordingly, such linkage is reasonably likely to deter Complainant and other employees from engaging in the EEO process.

In addition to direct evidence of retaliatory animus as the motivating factor in the issuance of EVAL 2, the record also contains evidence of legitimate, non-retaliatory reasons. Cases such as this, where there is evidence that retaliation was one of multiple motivating factors for an employment action, that is, the employer acted on the bases of both lawful and unlawful reasons, are known as "mixed motive" cases. Once a complainant demonstrates that discrimination/retaliation was a motivating factor in the employer's action, the burden shifts to the employer to prove, by clear and convincing evidence, that it would have made the same decision, even if it had not considered the discriminatory/retaliatory factor. See Price Waterhouse v. Hopkins, 490 U.S. 228, 249, 258 (1989); Tellez v. Dep't of the Army, EEOC Request No. 05A41133 (Mar. 18, 2005).

If the employer can make this demonstration, the complainant is not entitled to personal relief, that is, damages, reinstatement, hiring, promotion, back pay. But the complainant may be entitled to declaratory relief, injunctive relief, attorneys' fees or costs. See Walker v. Soc. Sec. Admin., EEOC Request No. 05980504 (Apr. 8, 1999). To avoid an order requiring reinstatement and the payment of back pay and damages, the employer must offer objective evidence that it would have made the same decision even absent the discrimination. In making this showing, the employer must produce proof of a legitimate reason for the action that actually motivated it at the time of the decision. A mere assertion of a legitimate motive, without additional evidence proving that this motive was a factor in the decision and that it would independently have produced the same result, would not be sufficient. The employer must prove "that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same action." Price Waterhouse, 490 U.S. at 276-77 (O'Connor, J., concurring); Feder v. Dep't of Justice, EEOC Appeal No. 0720110014 (July 19, 2012).

We find that the Agency failed to meet its burden of producing objective evidence and in establishing clear and convincing evidence that it would have taken the same action even if it had not considered the retaliatory factor. We do not find credible management's assertion that it viewed Complainant as a poor performer since day one, but nevertheless chose to issue her a special "Outstanding" performance rating with false statements about her performance to help her get promoted and motivate her to achieve.

This is especially incredible given the fact that the record is devoid of documentary evidence to support management's assertion that her performance was poor and S2 testified that Complainant was never counseled regarding her alleged poor performance. In addition, S2's testimony reflects his deep disdain for Complainant's participation in protected EEO activity. See Yahya S. Mahran v. Dep't of Agric., EEOC Appeal No. 05940973 (June 20, 1996). We find that management's mere assertion of a legitimate motive is not sufficient to meet its burden of proof.

CONCLUSION

Accordingly, based on a thorough review of the record we REVERSE the Agency's final decision and find that Complainant has established unlawful reprisal as alleged. We REMAND the matter to the Agency for compliance with the remedies specified in the ORDER herein.

ORDER

The Agency is ORDERED to take the following remedial action:

1. Within sixty (60) calendar days of the date this decision is issued, the Agency shall separate and expunge EVAL 2 from the Complainant's personnel file and any other centralized location other than its legal files pertaining to this case, and any, and all documents which incorporate or refer to EVAL 2. In its place in the Agency records the following words shall be inserted: "Because a detachment evaluation ending on June 6, 2017 was not performed, the special evaluation issued on March 24, 2017 shall take its place."
2. Within ninety (90) days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages, if any; and attorney's fees and costs, if any. The Agency shall allow Complainant to present evidence in support of her compensatory damages claim, and attorney's fees and costs. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages, and attorney's fees and costs (if applicable) no later than thirty (30) days after the completion of the investigation.
3. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide the management official identified as S2, sixteen (16) hours of in-person or interactive EEO training, with a special emphasis on reprisal.
4. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider whether disciplinary action against S2 is appropriate. The Agency shall record the basis for its decision to take or not to take such action and report the same to the Commission in the same manner that the implementation of the rest of the order is reported.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at the USNS WALLY SCHIRRA 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 (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:

A handwritten signature in blue ink, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

March 11, 2020

Date