



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

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Mark D.,<sup>1</sup>  
Complainant,

v.

Chad F. Wolf,  
Acting Secretary,  
Department of Homeland Security  
(U.S. Coast Guard),  
Agency.

Appeal No. 2019002035

Hearing No. 430-2017-00120X

Agency No. US-USCG-26280-2016

**DECISION**

On December 4, 2018, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), concerning his 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. Our review is de novo. For the following reasons, the Commission VACATES the Agency's final action.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as an Accounting Supervisor, GS-0510-13, at the Agency's Finance Center (FINCEN) in Chesapeake, Virginia.

On June 2, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment in reprisal for his prior protected EEO activity after he reported a management official (his Supervisor) was allegedly sexually

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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.

harassing one of Complainant's subordinates. Complainant identified several examples of the alleged reprisal-based conduct including, inter alia:

1. On April 27, 2016, Complainant was informed by the Supervisor that nothing was going to happen as a result of his reporting the April 22, 2016, event;
2. On April 29, 2016, Complainant contends the Supervisor subjected him to disparaging remarks, questioned him about tasks in a hostile manner, and shortened his response times on task due dates;
3. The Supervisor questioned Complainant's use of leave after April 22, 2016; and
4. The Supervisor issued Complainant a Letter of Caution regarding his leave on May 31, 2016

At the conclusion of the investigation, Complainant was provided a copy of the investigative file and requested a hearing before an EEOC Administrative Judge (AJ). The Agency submitted a motion for a summary judgment. The AJ granted the motion and issued a decision finding no discrimination, reprisal, or a hostile work environment occurred.

In the decision, the AJ determined that on April 21, 2016, Complainant, Supervisor, and the Accounting Tech Supervisor (Complainant's subordinate employee), attended a training session during which the Supervisor poked the Accounting Tech Supervisor in the back three times. On April 22, 2016, after discussing the event with the Accounting Tech Supervisor, Complainant reported the incident to a Human Resources official. During the week of April 25, 2016, Complainant informed the Supervisor that he reported him for his behavior toward the Accounting Tech Supervisor. According to Complainant, in late April 2016, the Supervisor began to impose unusually quick deadlines for his assignments, spoke disparagingly of him in front of Complainant's staff, questioned him about his sick leave, and in general treated him in a hostile manner.

On April 29, 2016, the Supervisor told Complainant that his recent actions with regard to deadlines and sick leave placed Complainant's career in jeopardy and they all would be accountable for what was occurring. The AJ noted that Complainant subsequently reported to the Human Resources official and the Commanding Officer (Captain) that the Supervisor had been harassing him since the moment he walked in the door that day.

On May 12, 2016, the Supervisor raised with Human Resources officials Complainant's purported failure to follow leave procedures. On May 31, 2016, the Supervisor issued Complainant a Letter of Caution for failure to follow leave procedures. The Captain subsequently met with Complainant to discuss the Supervisor's conduct. On June 7, 2016, the Agency determined there was evidence of tension within teams and ordered additional training for supervisors. Complainant retired on June 30, 2016.

The AJ observed that prior to April 22, 2016, Complainant and the Supervisor had a mostly amicable relationship, and Complainant consistently received positive feedback and ratings concerning his work.

However, Complainant and the Accounting Tech Supervisor maintained a regular dialogue about the Supervisor's hostile, derisive, and bullying treatment of the Accounting Tech Supervisor.

The AJ found that Complainant failed to establish that he was subjected to a retaliatory hostile work environment. The AJ reasoned that the acts of alleged harassment involved the Supervisor acting within the scope of his authority as Complainant's Supervisor. According to the AJ, despite the assertion that the Supervisor's behavior changed after Complainant engaged in protected activity, the Supervisor's actions were within the accepted range of activities of a reasonable manager. Further, the AJ stated that only the Letter of Caution of May 31, 2016, could be considered a discrete act among the alleged incidents of reprisal. The AJ found that several acts Complainant raised occurred before Complainant's April 22, 2016 protected EEO activity. Specifically, the AJ referenced a March 2016 training<sup>2</sup> and the Supervisor's March 25, 2016 directive that Complainant lower the performance evaluation of one of his subordinates. The AJ also referenced comments unaccompanied by any Agency action such as the Supervisor's April 27, 2016 alleged statement that nothing would come of Complainant's report of sexual harassment, and the Supervisor's alleged disparaging remarks and hostile questioning about Complainant's assignments. The AJ also indicated that he considered the setting of purportedly unreasonable deadlines for some of Complainant's assignments to be within the ordinary exercise of the Supervisor's management discretion.

With respect to the Letter of Caution, the AJ found that the Agency had a legitimate, non-retaliatory reason for its issuance. The AJ stated that Complainant failed to notify the Supervisor before leaving for the day on May 12, 2016, and that Complainant failed to present or otherwise identify evidence sufficient to create a genuine issue of material fact as to the question of pretext. As a result, the AJ found that Complainant had not been subjected to reprisal as alleged.

When the Agency failed to issue a final order within 40 days of receipt of the AJ's decision, the AJ's decision became the Agency's final action pursuant to 29 C.F.R. §1614.109(i). The instant appeal followed.

#### CONTENTIONS ON APPEAL

On appeal, Complainant contends that the AJ erred in granting summary judgment as there are facts that could not be resolved without a hearing. For example, Complainant argues that he established that the Supervisor committed reprisal against him by issuing the Letter of Caution. Complainant argues that the Supervisor changed the way he treated him after learning of his EEO activity.

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<sup>2</sup> On March 8, 2015, Complainant's second-level Supervisor assigned Complainant, the Supervisor and another employee training in preventing Unhealthy Workplace Conflict, Interpersonal Communication That Builds Trust, and Management Essentials: Managing a Diverse Team. On March 9, 2016, the second-level Supervisor assigned Complainant and another employee an additional course titled, "Management Essentials: Confronting Difficult Employee Behavior."

Complainant points out that on May 11, 2016, the Supervisor was interviewed concerning the alleged harassment on May 11, 2016, and that on the next day the Supervisor sought to take action against him for his use of leave.

Complainant disputes the AJ's finding that the Supervisor had a legitimate reason for initiating action against him. According to Complainant, the Supervisor inquired about taking action against him more than four hours before the Supervisor learned that he left early on May 12, 2016, on sick leave. Complainant states that he had never been questioned about his leave prior to reporting the Supervisor for sexual harassment. Complainant notes that he had previously requested sick leave without receiving the Supervisor's approval. Complainant states that there is no evidence that he was required to do anything other than enter his leave into the Agency's time and attendance system. Complainant explains that the Supervisor could look at the attendance and it would have informed him whatever he wanted to know. Complainant argues that the Supervisor knew he was disciplining him for leave he took in connection with his serious medical condition given that he had his Family Medical Leave Act form on record.

Further, Complainant challenges the AJ's reprisal analysis. Complainant argues that a reasonable employee could be dissuaded from making or supporting a charge of discrimination based on the Supervisor's actions. Complainant states that the employees knew why the Supervisor's attitude toward him had changed and took notice of what happens to individuals who report sexual harassment. Complainant points out that the Accounting Tech Supervisor stated that it was unfortunate to see the way he was treated after he reported the sexual harassment. Accordingly, Complainant requests that the Commission reverse the final action.

#### STANDARD OF REVIEW

We must determine whether it was appropriate for the AJ to have issued a summary judgment decision on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of 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 fact is "material" if it has the potential to affect the outcome of the case.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate.

In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." Anderson, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an AJ could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

### ANALYSIS AND FINDINGS

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 were no genuine issues of material fact that merited a hearing. We further find that the AJ made improper credibility determinations. In finding no reprisal, the AJ stated that the Supervisor did not issue the Letter of Caution based on retaliatory motivation. However, Complainant points out that the Supervisor contacted Human Resources more than four hours before he learned that Complainant had left the office early that day on sick leave. In fact, the Supervisor contacted Human Resources the day after he had been interviewed concerning the alleged harassment. Further, the record indicates that after Complainant informed the Supervisor that he reported the Supervisor's alleged harassment of the Accounting Tech Supervisor, the Supervisor allegedly uttered disparaging remarks about Complainant, imposed unreasonable deadlines for Complainant's assignments and questioned Complainant in a hostile manner with respect to those assignments. Complainant also challenges the AJ's statement that his retirement was voluntary.

We note that the hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 7-1 (Aug. 5, 2015); see also 29 C.F.R. § 1614.109(e). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims." Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (Mar. 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (Oct. 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995). The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrenner, 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 (Feb. 24, 1995). In summary, there are simply too many unresolved issues which require resolution through a hearing, including an assessment as to the credibility of the various witnesses. Therefore, summary judgment in favor of the Agency should not have been granted.

### CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, and arguments and evidence not specifically discussed in this decision, the Commission VACATES the Agency's final order and REMANDS the matter to the Agency in accordance with this decision and the Order below.

### ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. 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 hold a hearing and issue a decision on the complaint 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

January 24, 2020

Date