



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED],¹ [REDACTED]

Cristen T.,²
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Southern Area),
Agency.

Appeal No. 2019002523

Agency No. 4G770015618

DECISION

On February 26, 2019, 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 February 12, 2019, 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 VACATES the Agency's final decision and REMANDS this back to the Agency for a Supplemental Investigation as Ordered below.

ISSUES PRESENTED

Whether the Final Agency Decision (FAD) correctly determined that Complainant was not subjected to discrimination and harassment/hostile work environment as alleged.

¹ Our records show that on May 18, 2020, Complainant updated her personal information. All documents related to this case include a different last name, indicating a name change.

² 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Rural Carrier Associate (RCA) at the Agency's Post Office (PO) in Crosby, Texas. On May 29, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (white), national origin (Hispanic/Mexican), sex (female), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 as evidenced by ten identifiable and separate incidents that form the bases of her claims.

Record evidence reflects that Complainant had no EEO activity, prior to April 26, 2018, when she initiated EEO contact and subsequently filed the instant complaint. However, Complainant stated that sometime around March 15-16, 2018, she informed the Postmaster (PM1) and an Assistant Customer Service supervisor (ACS1) that she felt she was being subjected to bullying and discrimination by a coworker (C1); and that she was going to file an EEO complaint if they did not talk to him. She asserted that she was transferred to another postal facility less than 24 hours later.

Claim 1: On December 18, 2017, Complainant's coworkers made fun of her and told her that she was too slow and to quit if she could not handle the job.

Complainant alleged that her coworker (C1) told her that he would not train her, stating that he did not know why she was hired during the Christmas season. He also told ACS1 not to train her. She alleged that once when she arrived late, C1 told her that she needed to quit if she was going to be late so soon after starting with the Postal Service; and that he had to prepare part of her route. She stated that C1 told the other carriers they were going to need to assist her; that they made obscene statements, and laughed at her; that they complained that they had their own assignments to complete, and opined that PM1 should not have hired her during the Christmas season. She asserted that C1 also asked Complainant if all Mexicans were not hard workers, telling her it was easier to quit.

Complainant also described an occasion when two African American female coworkers (C2 and C3) laughed at how C1 treated her and how she tried to get him to assist her. She asserted that she had asked that they leave her alone if they could not help her, and had reported the matter to ACS1 with tears in her eyes. She asserted that C2 and C3 had stated that C1 was doing a good job of forcing Complainant to quit in record time over a previous employee who had suffered the same fate. She stated that a white female coworker had told her that the other coworkers just liked to gang up and bully other employees. Complainant explained that ACS1 talked to C1 and the other coworkers, asking them to stop while smiling; and that in response, C1 had stated this was free speech, and he was just speaking the truth.

Complainant stated her belief that her race was a factor in this claim because C1 told her in front of ACS1 that Hispanics were there to take away a black man's job, and they work harder for less pay. She stated her belief that her sex was a factor because C1 once told her it must be great to be female as women get away with anything and are taking men's job's.

He also stated, "Look around it's all women now ever wonder why it's called mailman?" She stated her belief that her national origin was a factor because C1 reminded her every other day that Mexicans work harder for less and were over-populating. Complainant asserted her belief that her EEO protected activity was a factor because they thought she was going to quit, and she told PM1 that they broke and berated her so badly, it was not fair.

ACS1 explained that she was Complainant's supervisor. In response to Complainant's allegations, she denied ever having a conversation with Complainant concerning who was to train her. She also denied hearing C1 make the alleged statements. She contended that she may have told Complainant to deliver packages because that was her job.

ACS1 also explained that on the day at issue, all carriers were stressed because of the holiday mail volume; and that while she sat at the desk located on the workroom floor, most of the carriers were complaining about having to help on different routes, but she never heard the carriers mention Complainant's name. ACS1 also affirmed that Complainant came to talk to her; and that in response, she advised her that it was a stressful time of year and that she would be okay. She stated that she also asked all carriers to keep their complaints to themselves or to come to the office if they needed to speak with management. She denied ever witnessing Complainant's coworkers make fun of her, tell her she was too slow, or to quit.

Claim 2: On December 29, 2017, the supervisor made inappropriate comments regarding Complainant's father's accident and stated, "people die every day."

Complainant explained that PM1 granted her permission to leave early because her father had been involved in an automobile accident. She alleged that ACS1 wanted her to stay due to a shortage of carriers and told her people die every day. She alleged that C2 followed her outside as she was leaving, pointed a finger in her face, and told her she did not care, she was not going to do Complainant's work, and Complainant should be fired. She stated that she told C2 that her father was in a bad accident and might not make it; and C2 responded, "Do I look like I care?" Complainant asserted that C2 told her that there were already two vacant routes that day, and she was not going to work on Complainant's route as well. She stated that C2 also told her that she was going to tell PM1 to fire Complainant.

Complainant stated her belief that her race was a factor in this claim because C1 had told her you needed to be ten shades lighter to get away with what the special colors get away with. She stated her belief that her sex was a factor because C1 always commented on how the Postal Service was for men and not women, and that is why carriers were called mailmen and not mailwomen. She stated that C1 also constantly argued with female employees and called his representative on everything she did. Complainant stated her belief that her national origin was a factor because C1 kept stating she was a minority and asking why Hispanics worked hard for nothing. She also stated that C1 was hoping for the wall (later stated as the "Trump wall") because Mexicans were taking jobs away from hard working black men. Complainant stated her belief that her EEO protected activity was a factor because she was transferred when she mentioned it, and her work hours were drastically cut.

ACS1 denied ever making the statements attributed to her by Complainant. In a hand-written document attached to her formal complaint, Complainant wrote that C2 followed her out of the office that day and told her "people die all the time."

Claim 3: On January 11, 2018, and February 12, 2018, Complainant was subjected to racial comments from her coworker.

Complainant alleged that C4 made weird noises on the intercom stating, "to you Spanish speaking people that can't speak or understand English, let me say it in your language." C4 then stated over the intercom, "googo blah wackawacka nah blah." Complainant asserted that C5 started laughing, and stated she hoped everyone was able to understand. She alleged that other employees also laughed, and her coworkers, including ACS1, looked at her. Complainant asserted that she reported the incident to PM1, letting her know that ACS1 also laughed; and PM1 promised to talk to the employees.

Complainant stated her belief that her race and national origin were factors in this claim because C4 literally addressed her statements to Spanish people who could not understand or speak English.

ACS1 acknowledged that C4 did make an announcement on the intercom and jokingly tried to translate it into Spanish. She asserted that she addressed the issue by telling all employees they were not allowed to use the intercom without management's permission; and that she specifically instructed C4 to refrain from attempting to translate English into Spanish if she did not know the Spanish language. PM1 provided supporting testimony, stating that she was not a witness to the alleged incident, but that she questioned C4 about Complainant's allegation. She asserted that C4 admitted to making the alleged statements, and PM1 instructed that C4 refrain from engaging in that type of conduct in the future. She asserted that C4 complied with her instructions.

Claim 4: On January 19, 2018, January 22, 2018, and March 15, 2018, Complainant's coworker intentionally left work for her to complete.

Complainant alleged that when C1 was assigned to her route, he would leave all of the ADVOS (a specific advertising mailing generally delivered to every residential household in the delivery area), hide first class mail and magazines under the carrier case, and bring back mail to the office. She asserted that she never spoke to C1 about his conduct, but when she informed ACS1, and ACS2 about it, they informed her there was nothing they could do. Complainant contended that they should have taken pictures of the mail and sent it to PM1.

Complainant stated her belief that her race was a factor in this claim because C1 never brought back or hid mail on any other route he was assigned to. She stated her belief that her sex was a factor because C1 always told her to go for it if she thought she could do a man's job. Complainant also stated her belief that her national origin was a factor because every day, C1 told her he was amazed how Mexicans liked to work for less.

ACS1 explained that Complainant never spoke to her about C1, especially about him leaving mail behind. She asserted that mail volume can be excessive on any given day, and if a carrier is given permission to curtail pre-sorted standard mail, she personally observes how much mail is being curtailed. She also stated that she has never witnessed or been told that C1 either hid the mail or threw it away.

PM1 provided supporting testimony, asserting that Complainant's allegation that C1 left work for her to complete was not true. She stated that the route that Complainant and C1 were assigned to had very heavy mail volume and both C1 and Complainant would curtail standard mail from time to time. PM1 maintained that C1 was instructed to deliver all of the ADVOS for the route.

Claim 5: On January 20, 2018, and continuing, Complainant's coworkers would belittle and make fun of her.

Complainant alleged that ACS1, C1, C2, C3, and others commented that Mexicans were supposed to be fast workers. She asserted that they commented that Complainant and C5, also Mexican, were too old for the job; and that everyone laughed when C1 commented that he bet they would be faster jumping a wall. Complainant asserted that she listened, and texted PM1 that evening to inform her about the incident.

Complainant stated her belief that her race was a factor in this claim because C1 stated that Complainant and C5 would be faster if they jumped a wall. She also stated her belief that her national origin was a factor because the wall refers to the "Trump Wall" to keep Mexicans from crossing the border.

ACS1 denied under oath that she and the other named and unnamed employees huddled together and commented about how Complainant and C5 were too old for the job, and how Mexicans were supposed to be fast workers. She also explained that she never heard C1 make the statements attributed to him about Mexicans being faster jumping a wall.

Claim 6: On January 23, 2018, Complainant's request for assistance was not provided.

Complainant asserted that she needed assistance because she was overwhelmed with unsorted mail and packages. She explained that she contacted the post office and was told that routes were down or was asked where she was. She stated that C1, C2, C3, and C6, would assist each other, but they did not want to help the rest of the employees, especially her.

Complainant stated her belief that her race and national origin were factors in this claim because C1, C2, C3, and C6 are all African Americans who only helped each other; and never wanted to help her. Complainant also stated that C1 and C2 told her she would never learn if they helped her.

ACS1 explained that three carriers delivered mail on Complainant's route; and that ACS2 was responsible for acting on Complainant's requests for assistance.

She asserted that Complainant never sent her a text on the date at issue or otherwise told her anything about needing assistance to deliver her route that day.

Claim 7: On February 20, 2018, Complainant was not allowed to leave heavy parcels in the office like her male coworkers.

Complainant alleged that she informed ACS1 that some heavy tool boxes scheduled for delivery were too big to lift unless someone helped her, and she was told it was her problem because those were her packages, on her route. She stated that ACS1 told her she would be written-up if she did not deliver the tool boxes, and she could not have anything on her record during her ninety-day probationary period. She asserted that she informed ACS1 that C1 always left packages behind, but she was told not to worry about him, and worry about herself instead. She stated that she also informed ACS1 that route six had just left behind a number of packages weighing less than ten pounds, and she was told that was not her problem.

Complainant asserted that she informed PM1 of the alleged incident; and that PM1 asked ACS1 why she was not making C1 and the carrier on route 6 deliver all of their packages. She asserted that ACS1 told PM1 that she would take care of it; and PM1 returned to her office. Complainant asserted that ACS1 took away her packages but did not say anything to C1 or the carrier on route 6, contending that the RCA on route 6 was a black female.

Complainant stated her belief that her race was a factor in this claim because she is Mexican, while C1, ACS1, and the female carrier on route six are all black. She also stated her belief that her national origin was a factor because "they" were always commenting on how Mexicans work and would do anything for a job.

ACS1 explained that Complainant was scanning packages to document that an attempt had been made at delivery, all the while intending to leave the packages in the office without attempting delivery because they were supposedly too heavy. She asserted that she told Complainant that carriers are not allowed to leave parcels in the office without attempting delivery; and that someone would be assigned to assist her load the parcels onto her delivery vehicle. She stated that Complainant refused her offer of assistance. She asserted that she has never allowed a carrier to leave parcels in the office because they were too heavy. ACS1 also stated that she has never allowed Complainant's identified coworkers to leave heavy parcels in the office without first attempting to deliver them.

Claim 8: On March 15, 2018, Complainant's male coworker subjected her to insults, jokes, sexual comments and negative racial remarks such as "he hated spicks and snitches."

Complainant alleged that C1 asked her why Mexicans do not allow their daughters to date black men; and that C2 told her she should not worry because even though C3 is also black, she does not have any children as she would not allow her daughter to marry a black man either. Complainant asserted that C1 turned around and stated, "Instead of judging us you all should try us, I'm just saying."

Complainant alleged that while she was having a conversation with ACS2 about C1's actions in leaving mail behind on his route, C1 came in the room and told ACS2 that he was tired of all of the "spicks," and then looked directly at Complainant as he walked by and stated, "I hate spicks and snitches." Complainant asserted that she told ACS2 that she was going to file an EEO complaint because management did not stop C1's misconduct. Complainant stated that ACS2 tried to dissuade her from her intended action, advising that she talk to PM1. Complainant alleged that ACS2 told her that she would be fired if she complained, and she actually should have been fired a long time ago. She also alleged that ACS2 told her she complained too much and could not take a joke; and that it was better to ignore C1's statements.

Complainant stated her belief that her race was a factor in this claim because she was the only employee who was picked on. She asserted that the Crosby PO eventually replaced her with a white female friend of ACS2's. She also stated her belief that her national origin was an issue because ACS2 had her friend from the Baytown, Texas, PO transferred to the Crosby location, and assigned her to Complainant's former route. Complainant stated her belief that her EEO protected activity was a factor because she was transferred to the Baytown PO less than 24 hours after she told ACS2 that she was going to file an EEO complaint even though nobody had approved the transfer.

ACS2 explained that she arrived in the office after being out on the street and observed Complainant on route seven. She stated she was surprised to see Complainant because Complainant had previously told her that she was quitting the Postal Service so Complainant could return to school and become a paramedic. She asserted that she told Complainant, "I thought you were leaving," and Complainant responded by stating that she felt picked on and wanted to transfer to the Baytown PO. ACS2 stated that C1 then entered the facility, asserting that at no time did he say anything to her or Complainant.

Claim 9: On or about March 15, 2018, Complainant was sent to a different facility and her work hours were reduced.

Complainant alleged that she told ACS2 that she wanted to be transferred to another facility. She alleged that ACS2 informed her that she could arrange for the transfer, and so Complainant asked ACS2 to do so. She stated that ACS2 informed her that the transfer could take some time, and PM1 would need to approve it. She asserted that ACS2 told her that it would be better if she resigned, because she could then return to a different postal facility. She stated that ACS2 handed her a blank sheet of paper and told her to write that she wanted to be transferred, and then sign it. She asserted that ACS2 told her that ACS2 would give the paper to PM1 but it would take a while to process.

Complainant stated that after making a telephone call, ACS2 told her to report to the Baytown PO the following day to help them, and then report back. She maintained that she agreed to the arrangement, and received a text message from ACS2 that evening stating, "Baytown paper work sent report to Baytown."

She testified that she sent a return text to ACS2, asking whether PM1 had approved the transfer, and whether she had completed her ninety-day probationary period. Complainant alleged that ACS2 sent a return text stating "Yeah."

Complainant alleged that C8 was similarly situated to her in that she also had face-to-face disputes with C1 yet C8 was never transferred to another postal facility. She stated her belief that her race was a factor in this claim because of how she was treated and the way management lied about her transfer; and because she was never given an opportunity to explain. She stated her belief that her national origin was a factor because she was belittled and humiliated on a daily basis and her alleged harassers literally used the word "Mexican." She also stated her belief that her EEO protected activity was a factor because they lied about her transfer, did not ask her any questions about her absences, and sent her a resignation form.

ACS2 explained that Complainant requested a transfer to the Baytown PO. She asserted that her assigned position with the Postal Service is Rural Carrier, and she has no authority to transfer any employee. She stated that she called the PM of the Baytown PO (PM2), in Complainant's presence, and asked if Complainant could work at the Baytown PO. She asserted that PM2 told her to have Complainant report to the Baytown PO the following morning. She affirmed telling Complainant to provide her with a written transfer request, which Complainant did; and left the facility. She denied ever sending Complainant a text stating that she had been transferred to the Baytown PO. ACS2 asserted that PM2 was responsible for completing all of the necessary paperwork with regard to Complainant's transfer request.

PM1 provided supporting testimony, explaining that the receiving office completes all of the paperwork when an employee transfers from one facility to another. She added that she contacted the Human Resources office (HR) about Complainant's transfer request; and that HR contacted PM2. She asserted that the Postal Service does not involuntarily transfer an employee to another facility and only does so upon the employee's request. The explanations provided by ACS2 and PM1 are corroborated by record evidence which includes the handwritten transfer request signed by Complainant.

Claim 10: On or about April 2, 2018, she was forced to resign from her postal position effective May 2, 2018.

Complainant alleged that PM1 is the management official who forced her to resign from the Postal Service. She alleged that ACS2 sent her a text message requesting documentation to support her absence from work; and that in response, she sent ACS2 a return text, and attached a picture documenting her case of victim assistance with the Harris County Sheriff's Department. Complainant did not provide an explanation as to why she was involved with the Sheriff's department. Complainant asserted that ACS2 did not return her text message so she called the Crosby PO and ACS2 told her that she was waiting for further instructions from PM1; and that Complainant should wait for a return call. She stated that the next thing she received was a letter from PM1 and a resignation form.

She asserted that she waited a while to see if the Crosby PO would call her back but when that did not happen, she realized they did not want her to return. Complainant asserted that she felt she had no choice but to resign, maintaining that she completed the resignation form and listed her complaints.

ACS2 explained that she saw Complainant's leave requests after Complainant stopped reporting for duty at the Baytown PO, and sent her a text message requesting documentation to support her continued absence from work. She stated that Complainant never responded to her text message. PM1 asserted that Complainant submitted her written resignation by mail two days before it was effective. She asserted that at no time did she ever insinuate or force Complainant to resign from the Postal Service. She also affirmed that Complainant was absent from work for weeks at a time after being assigned to the Baytown PO. PM1 asserted that the union steward of the Baytown PO contacted her to inform her that PM2 had not completed the paperwork to finalize Complainant's transfer. She maintained that she sent Complainant a letter of inquiry, and attached a resignation form because Complainant had requested one the day she was reassigned to the Baytown PO.

The record includes information from the Employee Resource Management System (ERMS) that confirms the statements provided by ACS2 and PM1 regarding Complainant's work absences. The record also contains a PS Form 2574, Resignation/Transfer from the Postal Service, signed by Complainant and setting an effective date of April 30, 2018, for her resignation.

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

CONTENTIONS ON APPEAL

In her Appeal note, Complainant asserts that she had filed a grievance regarding the bullying, taunting, harassment and hostile work environment on December 23, 2017; and that management was aware of that grievance. She also indicates that a management official had indicated to her that PM1 threw away complaints against ACS1 and C1.³

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, at Chapter 9,

³ To avoid an improper collateral attack on a forum outside of the Commission's EEO complaint process, Complainant's contentions regarding her grievance filing is not addressed in this decision. See Walsh v. United States Postal Service, EEOC Request No. 05980369 (Mar. 29, 2001).

§ 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

Retaliatory and Other Harassment/Hostile Work Environment

Complainant alleged in Claim 8 that ACS2 had made statements indicating that she would be fired if she complained about C1’s actions and management’s failure to address them. She also alleged that her African American coworkers, especially C1, subjected her to comments involving women and Mexicans in Claims 1 through 7. We find that the investigative record surrounding these allegations (and management’s alleged failure to act) was not adequately developed.

Complainant has raised very serious allegations indicating that she was subjected to severe and pervasive verbal conduct. The Supreme Court has held an employer who creates or tolerates a work environment which is permeated with "discriminatory intimidation, ridicule, and insult" that is sufficiently severe or pervasive to alter the terms and conditions of an individual's employment and which creates an abusive work environment is in violation of Title VII. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), citing Meritor Savings Bank F.S.B. v. Vinson, 477 U.S. 57 (1986). We find, however, the record in this case has not been adequately developed because none of Complainant’s coworkers provided testimonies. In fact, the record is devoid of any evidence that the coworkers were interviewed during the investigation, including C1 who should have provided testimony under oath. Since none of the identified witnesses were interviewed as part of the investigation, it is Complainant’s word against the statements, mostly denials, provided by ACS1 and ACS2. Given Complainant’s assertions of a discriminatory environment created by C1 which, if true, would likely have been witnessed by other coworkers or staff at the facility, none of whom were interviewed as part of the investigation, we find that the investigation was inadequate in this case.

Accordingly, we remand this complaint to the Agency for further investigation to supplement the record. We ask that the investigator interview all the carriers who worked at the Crosby, Texas PO facility, including but not limited to the African American coworkers. The investigation should uncover whether those coworkers had ever heard C1 make discriminatory references about Hispanics or females in the workplace. The investigation should also uncover whether anyone witnessed C1 or any other employees treating Hispanic or female carriers differently. Finally, we require that the investigator have C1 testify, under oath, regarding the comments and conduct attributed to him by Complainant.

*Disparate Treatment and Discriminatory Harassment
Constructive Termination: Claims 9, and 10*

To prevail in a disparate treatment claim, a complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). She must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 441 U.S. 802 at n. 13. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, a complainant must prove, by a preponderance of the evidence, that the agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr v. Hicks, 509 U.S. 502, 519 (1993).

Given the necessity of remanding for further investigation Complainant's claims of harassment based on her national origin and gender, it would be premature to make a determination on Complainant's reassignment and constructive discharge allegations in Claims 9 and 10 until her harassment claims are examined. That examination will reveal whether Complainant was subjected to discriminatory harassment at her facility. The examination will also show whether Complainant felt forced to seek reassignment, and to subsequently resign when her reassignment fell through, rather than continue working in an alleged discriminatory environment that management did not address.

We will therefor examine Complainant's allegations and make a determination on Claims 9 and 10 once further investigation is completed and the record is supplemented.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the Agency's final decision and REMAND this back to the Agency for a Supplemental Investigation as Ordered below.

ORDER TO SUPPLEMENT RECORD (B0617)

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

The Commission finds that the Agency's issuance of a FAD finding of no discrimination is inappropriate because the record had not been adequately developed.

The record is devoid of affidavits from Complainant's coworkers who may have seen or heard the harassing incidents alleged in Claims 1 through 8 that ultimately led to Complainant's transfer request in Claim 9. Those affidavits were either not included in the record or were not obtained by the Investigator.

Therefore, we find that the record has not been adequately developed for the Agency to have issued a decision of no discrimination and, accordingly, we remand the matter to the Agency for further investigation to supplement the record.

Within 45 days of receipt of this order, the Agency shall conduct a supplemental investigation, to include the following actions:

- a) Obtain testimony from C1, under oath, regarding the alleged comments in Claims 1 through 8, in particular, whether C1 made any of the comments or engaged in the behaviors attributed to him by Complainant;
- b) Obtain sworn affidavits from Complainant's coworkers, including C2, C3, and C6 regarding whether they witnessed or heard comments regarding Complainant's national origin or gender, specifically the comments identified in Claims 1 through 8;
- c) Obtain sworn affidavits from any other employees in the Crosby facility who worked with Complainant during the time in question. Each coworker shall be asked whether he or she witnessed or heard about the incidents Complainant alleged occurred in Claims 1 through 8;
- d) Obtain a sworn affidavit from the white coworker who allegedly told Complainant that her coworkers just liked to gang up and bully in Claim 1, and whether that coworker witnessed or heard comments regarding Complainant's national origin or gender, including the incidents identified in Claims 1 through 8;
- e) Obtain sworn affidavits from any witness who confirms that they saw or heard any kind of harassment or comments about national origin or gender; and whether they reported those comments to PM1 or whether they were aware that anyone else reported such comments to PM1.

Upon completion of the investigation, the Agency must provide the Complainant with a copy of the supplemental record and findings and return the completed record to the Compliance Officer, as referenced below. The Complainant may, **within fifteen (15) days** of receipt of the supplemental record, submit a statement concerning the supplemental record to the Compliance Officer. Upon receipt by the Compliance Officer, the supplemental record will be included in the appeal file and the appeal will be processed appropriately.

In accordance with Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § IX.E (Aug. 5, 2015), the Agency shall give priority to this remanded case in order to comply with the time frames contained in this Order. The Office of Federal Operations will issue sanctions against agencies when it determines that agencies are not making reasonable efforts to comply with a Commission order to investigate a complaint.

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 (R0610)


This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

July 7, 2020

Date