



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

[REDACTED]  
Jefferey K.<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2019003406

Agency No. 1J-531-0073-18

**DECISION**

On April 22, 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 April 9, 2019, final decision 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

**ISSUE PRESENTED**

The issues presented are: 1) whether the comments made by Complainant's supervisor about his EEO activity constituted a violation of Title VII; and 2) whether the preponderance of the evidence in the record establishes that Complainant was subjected to discrimination based on his age and in reprisal.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Full-Time Building Equipment Mechanic at the Madison, Wisconsin, Processing and Distribution Center.

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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.

On October 22, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of age (65) and reprisal for prior protected EEO activity when:

1. on July 12, 2018, the Supervisor of Maintenance Operations (S1) threatened to burn Complainant's house down;
2. on September 5, 2018, Complainant's computer access was revoked; and,
3. on a date not specified, Complainant requested information under the Freedom of Information Act (FOIA) and has not received the information.

On November 5, 2018, the Agency accepted claims 1 and 2 for investigation. The Agency determined that claim 3 was lodging a collateral attack on another forum's proceeding, specifically on the Department of Labor's FOIA process. Therein, the Agency dismissed claim 3 for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

The investigative record reflects the following pertinent matters relating to the subject claims.

On July 12, 2018, Complainant attended a meeting with his supervisor, the Manager of Maintenance (M1) (over 40), and the Supervisor of Maintenance Operations (S1) (over 40). During the meeting, Complainant asked S1 if his employees could assist Complainant on a project. S1 allegedly stated no and that people who worked with Complainant ended up getting EEO complaints filed against them. Complainant asserted that S1 then stated that if Complainant filed an EEO complaint against him, he would take Complainant to court, get his house, and then burn his house down. S1 noted he had an attorney in the family so Complainant should "try him." Complainant asked M1 if he heard what S1 had said and M1 stated he did not. However, M1 later testified that he had heard the conversation, but believed both men were joking.

S1 denied the allegations. M1 recalled the situation as Complainant did. However, he noted that both men appeared to be engaged in friendly banter, and he believed they were kidding around. M1 stated that if Complainant had felt truly threatened, he should have contacted the authorities immediately.

On July 31, 2018, Complainant initiated EEO Counselor contact regarding claim 1.

On September 5, 2018, Complainant's computer access to the Heating, Ventilation, and Air Conditioning (HVAC) system was revoked. Also, on this date, S1 logged into the HVAC system and edited operators and privilege sets. The log did not state which operators were affected.

Complainant affirmed his access to the HVAC computer system is an integral part of his duties as a building equipment mechanic. Complainant stated that S1 told him that the reason for revoking Complainant's HVAC computer access was due to Complainant making changes to the system without logging them in. Complainant believed his age was a factor because older employees are held to a different standard. Complainant stated that he filed a grievance and after two weeks his

access was restored by M1. The record indicated that by September 9, 2018, Complainant was back in the HVAC system.

M1 stated that he initiated a rule that any employee working on the HVAC systems had to log it in. M1 stated that Complainant was working on the HVAC system without logging it, despite his reminders. M1 noted that Complainant had been previously informed that if he did not log his HVAC activities then his system access would be revoked. M1 stated that none of Complainant's coworkers have violated his directive to log HVAC activities.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his 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 Agency concluded that Complainant did not prove that it subjected him to discrimination as alleged.

### CONTENTIONS ON APPEAL

Complainant asserted that ever since he reported a theft of Agency property by management, he has been a target. Complainant asserted that management has enabled toxic and hostile behavior that has allowed for harassment to go unaccounted. Complainant asserted that in attempts to intimidate him, S1 threatened to burn his house down. Despite making such a threat in front of M1, S1 was never disciplined. Complainant asserted that any action set in place to investigate and/or possibly discipline S1 was merely a sham. For example, Complainant asserted that M1 was aware of the threat, but chose to do nothing in hopes that the matter would settle itself. Regarding his computer access, Complainant asserted that M1's reason was merely pretext for discrimination. Complainant argued that the reason provided was a sham, and that plenty of workers make changes in the system without logging them in. Complainant also asserted that the EEO Investigator failed to investigate his concerns fully and listed a variety of questions that the EEO Investigator should have asked.

The Agency did not submit an appellate brief.

### 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, § 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

As a preliminary matter, we do not find reason to disturb the Agency's procedural dismissal of claim 3 for failure to state a claim.

Additionally, the Commission will address Complainant's dissatisfaction regarding the investigation of his complaint. Complainant claims on appeal that the investigation was inadequate. Upon review of the entire record, the Commission is not persuaded that the investigation into Complainant's complaint was incomplete or improper. Complainant failed to request a hearing, a process which would have afforded him the opportunity to conduct discovery and to cure alleged defects in the record. Thus, despite the above referenced arguments, the Commission determines that the investigation was properly and adequately conducted.

#### Reprisal

Complainant also alleges that the Agency retaliated against him. In accordance with the burdens set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973) and Coffman v. Dep't of Veteran Affairs, EEOC Request No. 05960473 (Nov. 20, 1997), a complainant may establish a prima facie case of reprisal by showing that: (1) he engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

#### Disparate Treatment

Complainant alleges that he was subjected to disparate treatment. A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For a complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802, n. 13; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for its actions, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of

whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983).

### Analysis

We have held that the actions of a supervisor violate Title VII and constitute reprisal where the supervisor acts to intimidate an employee and interfere with his or her EEO activity in any manner. Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998) (violation found where complainant told that filing an EEO suit was "wrong way to go about getting a promotion"). "When a supervisor's behavior has a potentially chilling effect on the ultimate tool that employees have to enforce equal employment opportunity, the behavior is a . . . violation." Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), req. for recons. den., EEOC Appeal No. 0520090654 (Dec. 16, 2010). Central to such a finding is that the conduct is reasonably likely to have a chilling effect on deterring the complainant or a reasonable employee from engaging in, or pursuing, protected activity. Christeen H. v. U.S. Postal Serv., EEOC Appeal No. 0120162478 (June 14, 2018).

Employees are protected from any discrimination that is reasonably likely to deter protected activity. See EEOC Compliance Manual, Section 8, "Retaliation," No. 915.003 (May 20, 1998) at 8-15; Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000). Here, S1's threat of burning down Complainant's house if he participated in the EEO process was reasonably likely to deter Complainant from engaging in protected activity as it creates a chilling effect. M1 recalled the event as Complainant alleged. It does not matter in this instance whether S1 believed he was joking with Complainant. Accordingly, we find that the Agency has committed a violation of the anti-reprisal provision of Title VII with regards to claim 1.

Regarding Complainant's disparate treatment claim in claim 2, if we assume, *arguendo*, that Complainant established a *prima facie* case of discrimination, the Agency has articulated legitimate, nondiscriminatory reasons for its action. Specifically, M1 implemented a new directive that all operators had to log his/her activity when accessing the HVAC system. M1 testified that Complainant was informed of this new directive but continued to access the system without logging in. Complainant asserted that his access was revoked due to his age, but the record does not support his contentions. The Commission next considers reprisal as it relates to claim 2.

Complainant also asserted an overall environment in which his EEO activity was scrutinized. In this case, Complainant initiated EEO Counselor contact regarding claim 1 on July 31, 2018, and his access to the HVAC system was suspended on September 5, 2018. The decision to revoke Complainant's status was made by M1 and carried out by S1. Based on the record, there is no evidence that M1 was motivated by retaliatory animus when he made his decision.

### CONCLUSION

The Agency's finding of no discrimination in claim 1 is **REVERSED** and **REMANDED** to the Agency for further processing in accordance with the **ORDER** below. The Agency's finding of no discrimination in claim 2 is **AFFIRMED**.

### ORDER

The Agency is ordered to take the following remedial action:

1. Within **sixty (60) calendar days** from the date this decision is issued, the Agency shall conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages and will provide all relevant information requested by the Agency. The Agency shall issue a final decision on the issue of compensatory damages. The supplemental investigation and issuance of the final decision shall be completed within **one-hundred and fifty (150) calendar days** of the date this decision becomes final. A copy of the final decision must be submitted to the Compliance Officer as referenced below.
2. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive training to M1 and S1 regarding their responsibilities with respect to eliminating discrimination in the federal workplace with a special focus on the anti-retaliation provisions of the law.
3. Within **thirty (30) calendar 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. 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.
4. The Agency shall post a notice in accordance with the paragraph below.

The Agency is 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 reflecting that the corrective action addressed above has been implemented.

### POSTING ORDER (G0617)

The Agency is ordered to post at its Madison, Wisconsin 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 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

September 22, 2020

Date