



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

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

v.

Megan J. Brennan,  
Postmaster General,  
United States Postal Service  
(Western Area),  
Agency.

Appeal No. 2020000357

Hearing No. 541-2017-00198X

Agency No. 4E-800-0057-17

**DECISION**

On September 18, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from an Agency final decision, dated August 15, 2019, 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

**BACKGROUND**

During the relevant time, Complainant worked as a Full-time Rural Carrier at the Agency's Parker Post Office in Parker, Colorado. Believing that she was subjected to harassment based on her race (Caucasian), sex (female), age (1959), and in reprisal for prior protected EEO activity (instant complaint), Complainant filed an EEO complaint on May 23, 2017.

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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.

The Agency framed the claims as follows:

1. On May 31, 2016 and June 23, 2016, Complainant was subjected to Investigative Interviews regarding an email her son sent to the Postmaster General.
2. On November 11, 2016, Complainant was subjected to an Investigative Interview regarding a letter she gave to her customers.
3. On December 2, 2016, Complainant was subjected to an Investigative Interview regarding a complaint letter from one of her customers.
4. On December 9, 2016, Complainant received a Letter of Warning for Failure to Follow Instructions and Inappropriate Conduct.
5. On December 10, 2016 and ongoing, management insisted that Complainant deliver to an address that is often blocked by customer vehicles and presents a safety hazard.
6. On December 10, 2016, and ongoing, including March 7, 2017; June 7, 2017; June 10, 2017; and June 14, 2017, management has accused Complainant of misdelivering packages.
7. On December 23, 2016, Complainant's substitute carrier did not scan vacation holds.
8. On December 23, 2016, Complainant's Postmaster ripped paperwork on an Express package out of her hands and said "you don't need that".
9. On December 30, 2016, Complainant was mandated to work overtime.
10. On December 30, 2016, Complainant was subjected to an Investigative Interview.
11. On January 12, 2017, Complainant was issued a 7-day No-time-off Suspension for Failure to Follow Instructions resulting in Unsatisfactory Performance.
12. On March 15, 2017, Complainant reported mis-deliveries of mail to her Supervisor and Postmaster and nothing was done.
13. On May 2, 2017, Complainant's Postmaster tried to get her to sign a document that she believed was incorrect, yelled at her, and threatened to subject her to an Investigative Interview.

14. On May 11, 2017, Complainant's Postmaster questioned her about putting a rubber band on a parcel, putting parcels on porches, and being rude to customers.
15. On June 1, 2017, Complainant was subjected to an Investigative Interview regarding several complaint letters received from customers.
16. On June 1, 2017, Complainant's Postmaster yelled at her about not delivering a package and threatened to put her on Emergency Leave if she did not leave the building immediately.
17. On June 29, 2017, Complainant was issued a 14-day Suspension.

On June 27, 2017, the Agency dismissed claim (1) for untimely EEO Counselor contact. The remainder of the formal complaint was accepted for investigation. At the conclusion of the investigation<sup>2</sup>, 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).

While the matter was pending before the AJ, Complainant filed a motion to amend, including the addition of a claim regarding her May 2, 2018 termination. On April 15, 2019, the AJ granted the motion. However, on the same day, the Agency informed the AJ that Complainant had filed a grievance regarding the termination. In her response filing, Complainant stated she had never filed a grievance regarding her termination and argued that the Agency falsified a grievance form. Complainant reiterated her denial in a telephonic conference call with the AJ. Thereafter, the Agency produced seven exhibits, including the grievance form, illustrating that Complainant did file a grievance. The AJ ordered Complainant to respond, with only "yes" or "no" replies, to six interrogatories addressing the Agency's exhibits. Upon receipt of the responses, the AJ concluded that Complainant "has been less than candid" and had filed the grievance. This, in addition to Complainant's non-compliance with the AJ's order restricting additional pleadings and email policy, caused the AJ to revoke Complainant's requested hearing. The AJ noted Complainant's conduct was not mere negligence, but reflected a "total disregard" for orders issued, clear instructions, and multiple warnings. The case was remanded to the Agency for a final decision.

In its August 15, 2019 decision, the Agency concluded that Complainant failed to prove that she was subjected to discrimination as alleged.

As an initial matter, the Agency found that Complainant did not establish a prima facie case of reprisal with respect to claims (1) through (12). Claims (1) through (11) occurred prior to her initial contact with an EEO Counselor in the instant case.

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<sup>2</sup> The Report of Investigation (ROI) reflects that Complainant failed to provide an affidavit. The investigator sent a request by mail on July 13, 2017, and made two additional attempts by email on July 12, 2017 and July 14, 2017.

With the absence of an affidavit from Complainant, she did not assert that the responsible management officials (RMOs) had prior knowledge of any protected activity. Although claim (12) occurred on March 15, 2017, after Complainant's initial contact, there was no evidence the RMOs were aware at that time. Complainant's initial interview with the EEO Counselor did not occur until March 30, 2017, after the alleged events. The Agency reasoned that Complainant also failed to present a prima facie case of age discrimination, as there was no evidence that age played a role. Both RMOs attested that they did not know Complainant's age. Further, the Postmaster was also over 40 years of age and, while younger than Complainant, not "substantially younger".

Nonetheless, the Agency assumed for purposes of analysis that Complainant established a prima facie case on all bases. Before considering the broader claim of harassment, the Agency analyzed those discrete acts that would, outside of the harassment framework, state a claim: claims (9), (11), and (17).<sup>3</sup> In claim (9), Complainant alleges she was required to work OT. Her supervisor, however, attested that Complainant had volunteered to work OT on that day. She later stated she was not going to work that day, but at that point the Agency had planned on her working and could not replace her. The 7-Day Suspension (claim (11)) was issued when Complainant failed to follow instructions, following an Investigative Interview and LOW. Similarly, according to management, when Complainant continued to make the same mistakes and failed to correct her deficiencies, a 14-Day Suspension (claim (17)) was warranted. After providing legitimate, non-discriminatory reasons, the burden shifted to Complainant to show the reasons were pretext for discriminatory animus. The Agency noted that Complainant declined her opportunity to submit evidence of pretext when she failed to provide an affidavit. Her unsupported allegations that her supervisor treated her differently than male, Latino/Mexican employees, reasoned the Agency, are inadequate to meet her burden.

In considering Complainant's harassment claim, the discrete acts were considered in conjunction with the remaining claims. Many of the incidents concerned Complainant's performance. For example, in claim (3), the Agency reasoned that the Investigative Interview stemmed from customer calls and complaints regarding Complainant's improper delivery of parcels. Complainant claimed that she did not have a safe way to turn around and so she did not take parcels to that address. Claim (5) addressed the same issue, and the management official explained that he went to the address himself with a safety officials and union steward. It was decided that Complainant could no longer drive up the driveway and she now leaves a notice if the customer has a parcel. In other instances, such as claim (8) and (13), the Postmaster stated that Complainant became rude, argumentative, and disrespectful. The Agency concluded that Complainant failed to prove the incidents occurred as alleged and did not provide any evidence of discriminatory motive.

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<sup>3</sup> Claim (4) was dismissed for untimely counselor contact. According to the Agency, in order for Complainant's January 27, 2017 contact to be timely, the alleged events needed to occur on or after December 13, 2016.

Many of the events, stated the Agency, were within the normal scope of supervising, instructing and disciplining employees.

Complainant filed the instant appeal. On appeal she provides numerous statements wherein she charges that the EEOC AJs committed fraud against her, the Agency falsified documents, and she was denied portal access after the hearing was canceled. Additionally, she disputes her May 2, 2018 termination.

### ANALYSIS AND FINDINGS

#### *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”).

#### *Dismissal of Hearing Request*

An AJ has the authority to sanction either party for failure without good cause shown to fully comply with an order. 29 C.F.R. § 1614.109(f)(3). The sanctions available to an AJ for failure to provide requested relevant information include an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information, exclusion of other evidence offered by the party refusing to provide the requested information, or issuance of a decision fully or partially in favor of the opposing party. See Hale v. Dep’t of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000).

These sanctions must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. A sanction may be used to both deter the non-complying party from similar conduct in the future, as well as to equitably remedy the opposing party. If a lesser sanction would serve this purpose, an AJ may be abusing his or her discretion to impose a harsher sanction. Dismissal of a complaint by an AJ as a sanction is only appropriate in extreme circumstances, where the complainant has engaged in contumacious conduct, not simple negligence. See Thomas v. Dep’t of Transportation, EEOC Appeal No. 01870232 (Mar. 4, 1988).

As set forth above, Complainant was found to have been repeatedly dishonest about the filing of a grievance. Her denials resulted in further inquiry by the AJ, the additional production of documents and evidence by the Agency, and overall delay of the hearing process. The AJ also noted that Complainant repeatedly disregarded her policy on emails and failed to follow previous orders.

For example, in the AJ's June 4, 2019 order Complainant was directed to respond to interrogatories without submitting additional information. The order specifically denied Complainant's May 24, 2019 motion seeking reconsideration and an additional opportunity to respond. Complainant was cautioned that failure to comply could result in sanctions. Nevertheless, Complainant filed several additional pleadings. We find that the AJ was well within the bounds of discretion in dismissing Complainant's hearing request given Complainant's failure to comply with the AJ's orders.

### *Disparate Treatment*

To prevail in a disparate treatment claim such as this, 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 generally 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). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep't of Veterans Affairs, EEOC Request No. 05950842 (Nov. 13, 1997). To ultimately prevail, 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 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, *supra*; Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995).

The instant record supports the legitimate, non-discriminatory reasons provided by management regarding claims (9), (11) and (17). The Postmaster and Complainant's supervisor agreed that she needed to work OT (claim (9)) on December 30, 2016, because she had originally volunteered to do so and when she later declined another employee was not available. Management explained that a junior employee had been given approval for leave and could not be called in. More senior employees could not be required to work the OT either. As for Complainant's assertion that newly hired employees that were casing mail could take her route, the Postmaster explained that those individuals were not fully training for delivery duties. The 7-day suspension (claim (11)) was based on errors made on two consecutive days by Complainant. In one instance she scanned two parcels for an address as a "Vacation Hold" but left them with "Vacation Hold" mail for a different address. The day prior, Complainant scanned the parcel for one address but delivered it to another address on a different street. Then the parcel was returned to sender as refused, though the customer did not endorse it as refused. Complainant was issued the 14-day suspension (claim (17)) for again placing parcels on a vacation hold even though it was not requested and for refusing to answer questions during the Investigative Interview. Her prior LOW and 7-day suspension were also contributing factors to the 14-day suspension.

As noted above, despite repeated attempts to contact her, Complainant did not provide an affidavit. On appeal she has not provided any evidence that the Agency's proffered reasons were pretextual.

Moreover, Complainant has not established any nexus between her protected bases and the Agency's actions. Therefore, we find that the Agency's finding of no discrimination in these discrete events (claims (9), (11), and (17)) was proper.

### *Hostile Work Environment*

To establish a claim of harassment a complainant must show that: (1) they belong to a statutorily protected class; (2) they were subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on their statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

Claims (2), (3), (10) and (15) concern investigative interviews. The Commission notes that merely conducting an investigation into purported improper or illegal conduct does not cause any injury without more, for example, resulting disciplinary action. Indeed, an agency is obligated to look into alleged improper conduct of its employees. See Rogers v. Department of Defense, EEOC Request No. 05940157 (February 24, 1995). While some of these interviews were relied upon in subsequent discipline, as noted above, the record reflect these actions were based on legitimate reasons. In other instances, claims (13), (14), and (16), Complainant contends she questioned about her performance and yelled at by the Postmaster. When asked, the Postmaster did not recall many of the specific incidents, but acknowledged "speaking with all employees regarding their work performance at various times" as part of her managerial responsibilities. With respect to the incident in claim (8), the Postmaster denied ripping a label but agreed that she took a paper from Complainant that she should not have had. The PM conceded that she was "starting to get angry because [Complainant] was very difficult to deal with. She becomes rude and disrespectful." Management officials dispute that several of the incidents occurred as described by Complainant. Others, the record shows, were based in legitimate concerns and efforts to correct Complainant's mistakes and poor performance. The instant record does not illustrate a hostile work environment. Moreover, we note that PM shares Complainant's protected bases of race, sex, and age. Complainant has not provided any evidence of a nexus between the allegedly harassing events and her protected bases.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we **AFFIRM** the Agency's final decision finding no discrimination.

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 (S0610)

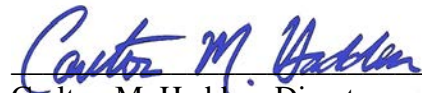
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

August 20, 2020

Date