



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

██████████
Celine B.,¹
Complainant,

v.

Alex M. Azar II,
Secretary,
Department of Health and Human Services
(Centers for Disease Control and Prevention),
Agency.

Appeal No. 0120181289

Hearing No. 410-2016-00263X

Agency No. HHS-CDC-0163-2015

DECISION

JURISDICTION

On February 26, 2018, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 30, 2018, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission REVERSES the Agency's final order.

ISSUE PRESENTED

The issue presented herein is whether the AJ properly issued a decision without a hearing.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Medical Technologist, GS-0644-12, at the Agency's National Center for HIV/AIDS, Viral Hepatitis, Sexually Transmitted Diseases, and Tuberculosis Prevention, Division of HIV/AIDS Prevention, Laboratory Branch in Atlanta, Georgia. Complainant claimed that her first-line supervisor (Supervisor) (female) was bisexual. She believed that the Supervisor subjected her to harassment. During the relevant time, until December 2013, Complainant's second-line supervisor was the branch chief (Chief1) (male) and following October 2014, another branch chief (Chief2) (male) was designated. The record indicated that the Supervisor retired from the Agency effective September 30, 2015.

On February 2, 2015, Complainant contacted the EEO Counselor. On March 31, 2015, and later amended, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female and heterosexual) and in reprisal for prior protected EEO activity arising under Title VII when she was subjected to discrimination and harassment. In support of her claim, Complainant alleged that the following events occurred:

1. On January 28, 2015, Complainant received a very low rating of 3.20 (Achieved Expected Results) and noticed negative comments under the Administrative element.
2. From October 2011 through July 10, 2014, Complainant was subjected to sexual harassment when the Supervisor addressed Complainant as "cutie."
3. On July 10, 2014 and November 25, 2014, Complainant's telework renewal requests were rejected and denied, respectively.
4. From January 31, 2013 to May 11, 2015, Complainant was subjected to a pattern of continuing harassment (non-sexual), including but not limited to:
 - a. On January 31 and February 1, 2013, Complainant was required to take AWOL for the 2 consecutive days in lieu of sick leave.
 - b. On January 31 and February 1, 2013, calls to Complainant's personal cell and home phones were made by the Supervisor after her tour of duty hours.
 - c. On August 12, 2014, Complainant received an email from the Supervisor questioning her reasons for needed leave she requested.
 - d. On November 20, 2014, the Supervisor's response to her request for a detail opportunity was she wanted to talk to the detail supervisor.
 - e. In December 2014, Complainant was interrogated and questioned by Chief2 about her reason for wanting to do a detail and he told her that he could not afford to let her participate on a detail at the time.
 - f. On January 7, 2015, the Supervisor said she would have made the detail 50/50 had she known that was an option and that Complainant would be back from the detail after 90 days.
5. On May 4-8, and 11, 2015, the Supervisor came to Complainant's detailed workplace and asked others about her whereabouts.

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 EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

The Agency filed its motion for a decision without a hearing. The Agency asserted that the record was complete and that there were no material facts in dispute. As such, the Agency asked that the AJ issue a decision in its favor without a hearing.

Complainant filed a response to the Agency's motion for summary judgment. Complainant noted that the Report of Investigation (ROI) failed to include several documents, specifically the exhibits listed as F-15, F-16, F-17, F-19, F-20, F-21, F-22, F-23, F-24, G-2, G-3, G-4, G-5, and G-6. Complainant argued that she had sought these documents during discovery. However, the only complete documents provided to her by the Agency were items G-4 and G-5. As such, Complainant argued that the matter was not ready for summary judgment and she had not been able to obtain the full record in order to respond. In addition, Complainant argued that the AJ could find in her favor regarding her claims of disparate treatment and harassment. Specifically, as to claim 1, Complainant argued that the Agency failed to provide a legitimate, nondiscriminatory reason for her rating. Accordingly, Complainant asked that the AJ deny the Agency's motion.

The AJ assigned to the case issued a decision without a hearing on December 15, 2017. We note that the AJ failed to address Complainant's argument as to the missing exhibits. The AJ made several findings of fact which the AJ determined were not in dispute. With regard to claim 1, the Supervisor emailed Complainant her 2014 performance appraisal on January 28, 2015. Complainant believed her rating of 3.2 was lower than it should have been. On January 31, 2015, Complainant met with the Supervisor and Chief2 to discuss her rating. Complainant asserted she felt bullied and harassed from the Supervisor from referring to her as "cutie." The AJ noted that Chief2 did not recall Complainant making such a statement. Chief2 indicated that he did not have firsthand knowledge of Complainant's performance and concurred with the Supervisor's rating. Complainant believed that the lower rating was because the Supervisor had a romantic interest in her based on the three occasions the Supervisor called Complainant "cutie" over the course of three years and that Complainant did not reciprocate the Supervisor's alleged interest. Complainant also argued that the rating was in retaliation for her asking the Supervisor to stop calling her "cutie."

As to claim 2, Complainant asserted that she was called "cutie" three times, namely in November/December 2011, March/April 2012, and in July 2014. Complainant also asserted that the Supervisor's "eye contact and voice were very sexual in nature" and that the Supervisor was overly friendly with Complainant. The AJ held that Complainant did not allege that the Supervisor made any other statements or took any actions that were related to sex or sexual orientation.

Complainant alleged that she sought to renew her telework agreement in July 2014. The Supervisor approved of Complainant's telework request.

However, the Deputy Director (female, sexual orientation unknown) denied it because the Supervisor noted a concern on Complainant's mid-year performance appraisal about her ability to locate and contact Complainant when she was teleworking. The Deputy Director stated she would reconsider the request if Complainant resubmitted it in three months. Complainant resubmitted the request in October 2014. The request was denied by the Supervisor because of "organizational exigencies that impact on the mission of the employer and require the employee to perform work at the official work site." Complainant believed that the request was denied after she told the Supervisor to stop calling Complainant "cutie." The Deputy Director played no part in the renewed request denial.

In claim 4, Complainant alleged that she was subjected to harassment on the basis of sex, sexual orientation, and/or in reprisal based on events from January 2013 through May 2015. Regarding the events from January 31 to February 1, 2013, Complainant left a voice message reporting her illness with the Supervisor's second-in-charge (SIC), but not the Supervisor. The Supervisor attempted to call Complainant and left a message. Complainant did not return the call because she believed it was too late to call. She returned the call the following Monday. Complainant believed that the Supervisor improperly contacted her in connection to her absences from work those days. Complainant believed that the Supervisor was harassing her by asking why she was taking leave in August 2014 and stating that she wanted to talk to her "detail supervisor" before approving Complainant's request for a detail in November 2014. Complainant also felt harassed in December 2014, when Chief2 interrogated her about the reasons underlying her request for the detail. Finally, Complainant raised a meeting in January 2015 when the Supervisor suggested that, had she known it was an option, she would have approved Complainant's detail request by allowing her to split her time "50-50" between the detail and her permanent position.

Finally, as to claim 5, Complainant claimed that the Supervisor discriminated against Complainant when in May 2015, she visited Complainant's detail location and asked about Complainant's whereabouts on one or two occasions.

Based on these facts, the AJ determined that there were no material facts in dispute. Further, the AJ held that claims 2 and 3 were raised in an untimely manner. The AJ noted that these events occurred well outside of the 45-day time limit of February 2, 2015. Therefore, the AJ concluded that these events were not separately actionable on their own and were dismissed pursuant to 29 C.F.R. § 1614.107(a)(2).

The AJ also dismissed claim 5 pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. The AJ noted that the event alleged did not harm Complainant in any way. As such, the AJ concluded that claim 5 is not actionable on its own.

The AJ then addressed Complainant's claim of disparate treatment alleged in claim 1. Assuming Complainant established a prima facie case of discrimination, the AJ held that the Agency has articulated legitimate, nondiscriminatory reasons for Complainant's performance appraisal, namely the observations of Complainant's performance by the Supervisor. The AJ then turned to Complainant to establish that the Agency's reason was pretext.

The AJ found that Complainant failed to identify any evidence sufficient to establish that the Agency's reason was pretext for discrimination based on sex. The AJ specifically indicated that it was Complainant's subjective belief, which was not sufficient to create a genuine issue of material fact for pretext. To the extent Complainant alleged unlawful retaliation, the AJ similarly determined that Complainant did not substantiate her claim that the reasons were pretext.

The AJ then turned to Complainant's claim of harassment as alleged in claims 1-5. The AJ held that Complainant failed to establish the third and fourth elements of prima facie case of hostile work environment. Specifically, the AJ determined that Complainant did not show that she was subjected to events involving her protected classes or that the alleged events occurred because of her protected bases. The AJ pointed to Complainant's claim that the Supervisor called her "cutie" on three occasions over three years. The AJ found that this was not sufficient evidence of sex-based harassment, citing to Commission precedent. Further, the events alleged as Complainant asserted were not sufficient to alter the condition of Complainant's employment or create a hostile work environment. As such, the AJ concluded that Complainant failed to demonstrate that the alleged actions constituted violations of Title VII.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

This appeal followed. Complainant argued through counsel that the AJ's decision was not appropriate. Complainant noted that the ROI provided by the Agency lacked exhibits. Complainant had tried to obtain the documents during discovery. However, the Agency failed to provide the documents for twelve of the requested fourteen exhibits. The AJ failed to address this issue in the decision granting summary judgment. As such, Complainant asked that the Commission remand the matter for a hearing. Complainant argued that the Agency's failure to supply the documents has not allowed her to obtain information to support her complaint. Complainant also argued that the AJ erroneously dismissed claims 2, 3, and 5. Furthermore, Complainant argued that she had been subjected to disparate treatment and harassment in violation of Title VII.

The Agency failed to respond to Complainant's arguments on appeal.

STANDARD OF REVIEW

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes.

In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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

Initial matters

The Commission requested that the Agency provide us with the complete record in order to process the instant appeal. We note that the Agency provided a copy of the ROI. Upon review, we determined that the Agency failed to provide the complete record. As such, the Commission communicated via email to the Agency to provide the Commission with the hearing record. In response, the Agency provided the Commission with the Agency’s motion for summary judgment. The Commission informed the Agency that the hearing record failed to include a copy of Complainant’s motion for summary judgment and asked that Agency provide the Commission with the document in question. The Agency initially indicated that it did not have a copy of the document and challenged the Commission’s request for the document. Subsequently, the Agency provided a copy of Complainant’s motion for summary judgment. This was the extent of the hearing record provided to the Commission in response to the instant appeal.

Summary judgment

We determine whether the AJ appropriately issued the decision without a hearing. The Commission’s regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC’s decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party’s evidence and must draw justifiable inferences in the non-moving party’s favor. Id. at 255. A “genuine issue of fact” is one that a reasonable judge could find in favor for 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 “material” fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep’t of Def., EEOC Appeal No. 01A24206 (July 11, 2003).

Issuing a decision without holding a hearing is not appropriate for a case that can only be resolved by weighing conflicting evidence. If the non-moving party “has not had the opportunity to discover information that is essential to his opposition,” then a decision without a hearing is inappropriate. Anderson, 477 U.S. at 250. The AJ must enable the non-moving party to engage in sufficient discovery to respond to a motion for a decision without a hearing. After receiving an opposition to a motion for a decision without a hearing, an AJ may order discovery as necessary. 29 C.F.R. § 1614.109(g)(2).

We carefully reviewed the record and find it inadequately developed. We note that the Commission obtained a copy of the ROI from the Agency. The copy provided to the Commission included a list of exhibits provided by the Investigator. For items identified as F-11 through F-24 and G-1 through G-6, the Investigator provided a memorandum to the file stating that she had requested these documents from the Agency. The Memorandum indicated that Agency officials stated that they were to provide the documents for inclusion in the ROI. The documents requested by the Investigator included: an organizational chart; the workforce profile; list of subordinates to the Complainant’s immediate supervisor, annotated by gender and prior EEO activity for 2013-2015; Complainant’s position description; Complainant’s performance plan/evaluation for 2013 and 2014, including any supporting documentation and mid-year reviews; Complainant’s telework requests and decision notices; copies of Complainant’s leave requests at issue in claim 4; copies of detail requests and decisions alleged in claim 4; comparator information regarding performance appraisals, telework, and details; labor agreement/contract that applies to telework and details; the Agency’s civil rights/anti-harassment policy; contemporaneous notes kept by the Supervisor; documentation of any other similar allegations of harassment made against the Supervisor and the Agency’s response; any response/action taken by the Agency if Complainant reported the alleged harassment before filing this EEO complaint; and documentation of any harassment prevention and sexual harassment training provided to the Supervisor and to Complainant. For each exhibit item, the Investigator created a place holder sheet and noting the item promised by the Agency stating that it was “(Not received from the Agency).”

We also note that the copy of the ROI provided to the AJ also contained the same place holder documents. Complainant indicated that she had tried to obtain a copy of these items during discovery. The Agency only provided a couple of items. Complainant was unable to obtain the remaining documents.

Complainant made the AJ aware of the missing documents. There is no indication that the AJ took any action to resolve the issue of the missing documents. Furthermore, the AJ’s decision relied on the Supervisor for proof that the alleged actions were not discriminatory based on Complainant’s sex and/or prior protected activity. As the record indicated, the Supervisor retired from the Agency in September 2015. Further, the Investigator provided a memorandum stating that she attempted to contact the Supervisor. However, the Investigator could not obtain evidence from the Supervisor as she did not engage in the investigation. As such, documents such as notes from the Supervisor would be insightful.

Therefore, the AJ’s issuance of a decision without a hearing was inappropriate. We find that the record has not been adequately developed. There are outstanding requests for documents by the Investigator who indicated that Agency officials were to provide the documents for the ROI.

Despite the Investigator's follow up contact with the Agency officials, she was never able to obtain these documents. Further, when Complainant sought to obtain the documents to respond to the Agency's ROI, she was denied the documents during discovery. The AJ was made aware of the need for the documents. However, the AJ did not address Complainant's request. Furthermore, the AJ relied on denials by the Supervisor. But the Supervisor did not provide an affidavit or any other evidence to the ROI. Therefore, we find that the record has not been adequately developed for the AJ to have issued a decision on summary judgment.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission reverses the Agency's final action 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 is issued. 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 further develop the record and order the Agency to produce the documents it should have produced during the investigation of the instant matter. After the AJ has further developed the record, the AJ may process the hearing request 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 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

May 5, 2020
Date