



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

[REDACTED]
Frances A.,¹
Complainant,

v.

William P. Barr,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2019004187

Agency No. BOP-2017-0503

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 31, 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. For the following reasons, the Commission REVERSES in part, and AFFIRMS in part, the Agency's final decision.

ISSUES PRESENTED

The issues are whether Complainant established that the Agency discriminated against him based on his religion or in reprisal for protected EEO activity when it failed to grant his request for a religious accommodation; or subjected him to retaliatory harassment.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Chaplain at the Agency's Federal Corrections Institution in Bennettsville, South Carolina (FCI Bennettsville).

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.

On February 6, 2017, the Agency's Acting Director issued a statement to authorize and regulate the use of Oleoresin Capsicum (OC) Aerosol Spray, a form of pepper spray. Employees at facilities that were not minimum or low security were authorized to carry OC spray while on duty, after completing specialized training. Report of Investigation (ROI) at 238-43.

On March 22, 2017, the Warden (Christian/Baptist) issued a memo announcing that all FCI Bennettsville staff with a duty station past the Control Center were required to carry a cannister of OC, with the exception of the chaplains. The Warden noted that this new policy would be effective April 15, 2017. ROI at 132. Complainant stated that less than a week later, his first-line supervisor (S1) (Baptist) informed him that the exemption was rescinded. ROI at 101.

On March 28, and 30, 2017, Complainant submitted written requests for a religious accommodation to the Warden. Complainant stated that the Agency's policy violated his religious beliefs and that he cannot carry a weapon for offensive or defensive purposes. Complainant requested an exemption from the Agency's policy to carry OC spray. ROI at 472, 474-5.

Complainant stated that he hurt his back and was on light duty. ROI at 120. The record shows that Complainant's injury occurred on April 16, 2017. ROI at 456. Complainant stated that on or about May 24, 2017, he learned of harassing messages on social media calling him a "crybaby" for not carrying OC spray. Complainant also stated that one of the secretaries said that Complainant should find another job. ROI at 102, 117-18.

On June 22, 2017, the Warden issued a denial of Complainant's request for a religious accommodation for an exemption to carry OC spray. The Warden stated that a failure of the chaplains to carry OC spray was a "genuine safety and security risk." The Warden added that Complainant's request was an undue hardship because there would be a "significant impact" on the facility operations by reducing the safety of the institution during an emergency or requiring additional prepared staff to respond to an emergency. The Warden noted that the nature of a chaplain's position required close contact with inmates, where they could be called to assist in an emergency. ROI at 133-4.

On October 25, 2017, an attorney requested that the Agency rescind the requirement that Complainant, and the other two chaplains, carry OC spray due to the conflict in their sincerely held religious beliefs to not carry weapons when engaged in ministry. ROI at 582-9. On November 16, 2017, the Warden notified Complainant that the Agency decided to grant his requested accommodation and that he would not be required to carry OC spray. ROI at 470.

EEO Complaint

On April 13, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on his religion (Oneness Pentecostal (Pacifist)) and in reprisal for prior protected EEO activity when it failed to grant his request for a religious accommodation; and he was

subjected to a retaliatory hostile work environment due to comments regarding his request for a religious accommodation.²

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an EEOC Administrative Judge. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

As an initial matter, the Agency noted that while Complainant alleged disparate treatment, his claim was more appropriately categorized as a claim of a failure to provide a religious accommodation. The Agency then determined that Complainant did not establish that he was discriminated against when he was denied a religious accommodation. The Agency noted that while the Warden initially denied Complainant's request, Complainant was out of the office on workers' compensation since April 2017. The Agency found that Complainant returned to the office in mid-August, at the earliest (the exact date of Complainant's return was not clear from the record), he would have been subjected to the OC spray policy for at most three months. The Agency noted that while a delay in granting an accommodation can be a viable claim, there was no evidence that Complainant was harmed by the delay or that he ever had to carry OC spray. In addition, the Agency found that there was no evidence of retaliatory action due to Complainant's request for a religious accommodation or his EEO activity.

The Agency also found that Complainant did not show that he was subjected to a hostile work environment. The Agency found that while Complainant provided evidence of one social media post calling him a "crybaby," this single incident was insufficient to establish a hostile work environment. The Agency noted that Complainant did not provide sufficient detail regarding other alleged harassment. The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Complainant filed the instant appeal, but he did not provide any arguments in support of his appeal. Rather, Complainant noted that he was appealing proposed discipline, and he attached a copy of a proposed suspension, dated October 11, 2018.³ The Agency did not respond to Complainant's appeal.

² Complainant requested to amend his complaint to include a retaliatory harassment claim on June 21, 2017. The Agency responded that Complainant's amendment was additional evidence for his harassment claim, and not a new claim, and would be subsumed into his complaint. ROI at 58. However, the Agency noted in its final decision that a hostile work environment claim had not been accepted, but since it was investigated, it would address the claim.

³ The Commission has held that it is not appropriate for a complainant to raise new claims for the first time on appeal. See Hubbard v. Dep't of Homeland Security, EEOC Appeal No. 01A40449 (Apr. 22, 2004). Should he wish to pursue this new claim, Complainant is advised to contact an EEO Counselor to initiate the administrative process. For timeliness purposes, if Complainant's initial contact would have been timely on the date he filed his appeal (June 13, 2019), then

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 Chap. 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”).

Religious Accommodation

Under Title VII, employers are required to accommodate the religious practices of their employees unless a requested accommodation is shown to impose an undue hardship. 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(b)(1). A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to comply with his religious beliefs. See Ian S. v. Dep’t of the Treasury, EEOC Appeal No. 0120160622 (Apr. 27, 2018); Complainant v. Dep’t of Justice, EEOC Appeal No. 0120132112 (Apr. 17, 2015). The need for religious accommodation most frequently arises where an individual’s religious beliefs, observances, or practices conflict with a specific task or requirement of the job. Id. The employer’s duty to accommodate will usually entail making a special exception from, or adjustment to, the particular requirement so that the employee will be able to practice his religion. Id. When an employee’s religious belief or practice conflicts with a particular task, appropriate accommodations may include relieving the employee of the task or transferring the employee to a different position or location that eliminates the conflict with the employee’s religion. Id.

The traditional framework for establishing a prima facie case of discrimination based on religious accommodation requires an employee to demonstrate that: (1) he has a bona fide religious belief, the practice of which conflicted with his employment; (2) he informed the agency of this belief and conflict; and (3) the agency nevertheless enforced its requirement against the employee. Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993); Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984).

In this case, it is undisputed that Complainant has a bona fide religious belief that prevents him from carrying OC spray. Complainant notified the Agency of his conflict and requested an accommodation for an exemption to carry the OC spray. On June 22, 2012, the Agency denied Complainant’s religious accommodation request, stating that it would be an undue hardship.

Complainant’s contact will be deemed timely if initiated within ten (10) days of the date he receives this decision.

To show undue hardship, an employer must demonstrate that an accommodation would require more than a de minimis cost. Trans World Airlines v. Hardison, 432 U.S. 63, 74 (1977). Relevant factors may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation. The employer needs to demonstrate how much cost or disruption a proposed accommodation would involve. See Don T. v. U.S. Postal Serv., EEOC Appeal No. 2019001176 (Jan. 30, 2020); Heidi B. v. U.S. Postal Serv., EEOC Appeal No. 0120182601 (Nov. 8, 2019). We note that there is no cost associated with Complainant's requested accommodation, and as such, we will focus on the requested accommodation's impact on FCI Bennettsville.

The Warden stated that Complainant's request presented an undue hardship on the Agency because the accommodation would have a "significant impact" on the operation of the facility by reducing the staff members on duty who are prepared to respond to an institutional emergency. ROI at 127. However, we note that the Warden did not adequately explain how granting one employee's exemption to carry OC spray would have a "significant impact" on FCI Bennettsville. Specifically, we note that a witness stated that FCI Bennettsville had approximately 300 staff members who would carry OC spray. ROI at 270. Another witness stated that Complainant worked in the chapel, and that there were other employees at the chapel who would have the OC spray. ROI at 288. As such, we are not persuaded that the Agency has shown how exempting one employee, out of approximately 300 (or 0.33% of the employees), would have significantly impacted its operations during an emergency. We find that the Agency did not meet its burden to show that granting Complainant's request for an exemption to carry OC spray was an undue hardship.

"A refusal to accommodate is justified only when an employer ... can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation." 29 C.F.R. § 1605.2(c). Pursuant to 29 C.F.R. § 1605.2(d), alternatives for accommodating an employee's religious practices include, but are not limited to, voluntary substitutes and swaps, flexible scheduling, and lateral transfers and job changes. See Samuel R. v. Dep't of Commerce, EEOC Appeal No. 2019001557 (Aug. 19, 2020). Complainant stated that there was an opening at a nearby "low" facility. ROI at 103-5. However, there is no evidence that the Agency explored a transfer, or any other alternative accommodation, and it did not show that an undue hardship would result from a lateral transfer to a different facility.

We find that the Agency discriminated against Complainant when it denied his request for a religious accommodation from June 22, 2017, through November 16, 2017. Accordingly, we REVERSE the Agency's decision and find that Complainant established discrimination when the Agency failed to grant his request for a religious accommodation and ORDER the Agency to take further action in accordance with the Order below.

As Complainant would not be entitled to any additional remedies, we do not find it necessary to address whether the Agency's actions were also motivated by reprisal.

Retaliatory Harassment

Harassment is actionable if it is sufficiently severe or pervasive that it results in an alteration of the conditions of a complainant's employment. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002, at 3 (Mar. 8, 1994). To establish a claim of harassment, Complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Humphrey v. U.S. Postal Service, EEOC Appeal No. 01965238 (Oct. 16, 1998).

Complainant alleged that he was subjected to retaliatory harassment when he learned of harassing messages on social media, due to his request for an exemption to carry the OC spray. Complainant stated that there were "several negative comments" posted on social media, and he specified messages calling him a "crybaby," and statements that Complainant should find another job. ROI at 117-8. However, we find that the complained of conduct was not sufficiently severe or pervasive to create a hostile work environment. Complainant has not shown that these social media posts had the purpose or effect of unreasonably interfering with his work performance, and we find that they were insufficient to create an intimidating, hostile, or offensive work environment. As such, we AFFIRM the Agency's finding that Complainant did not establish that the Agency subjected him to retaliatory harassment.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's finding that Complainant did not establish that the Agency subjected him to retaliatory harassment. However, we REVERSE the Agency's decision regarding its failure to provide a religious accommodation and REMAND the matter to the Agency for further processing in accordance with this decision and the ORDER below.

ORDER

1. Within ninety (90) calendar days from the date that this decision is issued, the Agency shall complete a supplemental investigation, and issue a decision, in order to determine Complainant's entitlement to compensatory damages incurred as a result of the Agency's unlawful denial of his religious accommodation request for an exemption to carry OC spray from June 22, 2017, through November 16, 2017. The Agency shall afford Complainant the opportunity to submit evidence in support of his claim for damages within the 90-day time frame, and Complainant shall cooperate with any additional evidentiary requests made by the Agency. Within thirty (30) calendar days of the date that the Agency determines the amount of compensatory damages owed Complainant, the Agency shall pay that amount.
2. Within ninety (90) calendar days from the date that this decision is issued, the Agency shall identify and provide appropriate remedial EEO training to the responsible management officials,⁴ such as the Warden, including at least eight (8) hours of in-person or interactive training on Title VII and an Agency's obligation to provide accommodations to its employees for their sincerely-held religious beliefs. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
3. Within sixty (60) calendar days from the date this decision is issued, the Agency shall consider taking disciplinary action against the identified responsible management officials. The Commission does not consider training to be disciplinary action. 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. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
4. The Agency shall immediately post a notice in accordance with the paragraph below.

POSTING ORDER (G0617)

The Agency is ordered to post at its Federal Corrections Institution in Bennettsville, South Carolina 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.

⁴ The record shows that other Agency officials were involved in the decision; however, they were not specifically named. For example, witnesses noted that individuals at the Regional Office, Employment Labor Branch, Human Resources Management, and the Director's Office were involved in the decision to deny Complainant's religious accommodation. ROI at 145,197.

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).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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 (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the complainant or the agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>.

Alternatively, complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted together with the 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

November 30, 2020

Date