



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

[REDACTED]
Eric M.,¹
Complainant,

v.

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

Appeal No. 2019005414

Hearing No. 451-2015-00101X

Agency No. BOP-2015-02157

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated July 30, 2019, dismissing his complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission VACATES the Agency's final order and REMANDS the complaint for further processing.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Teacher, GS-1710-09, at the Agency's Federal Correctional Complex in Yazoo City, Mississippi.

On September 25, 2015, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (Asian-American) and reprisal for prior protected EEO activity² under Title VII of the Civil Rights Act of 1964.

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.

² Complainant alleged that during a meeting in April 2015, he voiced concerns to management about discrimination relating to his performance appraisal. See Report of Investigation (ROI) at 000062-63; see also Complainant's Appellate Brief at 10.

Complainant subsequently amended his complaint on October 8, 2015 and October 14, 2015. The Agency accepted the following claims for investigation:

1. On August 12, 2015, management presented exaggerations and lies pertaining to him, thus attacking his character;
2. On September 10, 2015, he was accused of addressing a classroom full of African-Americans as, “you people”;³ and
3. On October 5, 2015, management informed him that they needed to take his testimony for an event that occurred on March 13, 2015.

Complainant subsequently filed another request to amend on December 8, 2015, wherein Complainant sought to add approximately 30 individual claims. Examples of Complainant’s new claims included, but were not limited to, allegations that at least three supervisors in his chain of command collectively created a hostile work environment when:⁴

- iii. On September 4, 2014, from 11:32:59 a.m. to 11:56:12 a.m., management put three different notes in his file;
- v. On September 12, 2014, he brought in dice to teach inmates mathematical probability, but management characterized the dice as contraband and reprimanded him without allowing him to provide a rebuttal statement;
- vi. In September 2014, he was reassigned from “the LOW to the MEDIUM”;
- viii. On October 27, 2014, management put a note in his file for switching workdays with a coworker and for allegedly failing to follow protocol procedures;
- xv. Management instructed two of Complainant’s colleagues to monitor him and report to management. Complainant learned of this surveillance in the note that management had placed in his file on January 26, 2015;
- xv. In March 2015, management changed his performance evaluation ratings from “Excellent” to “Successful” without giving him any warning or explanation;
- xx. On May 15, 2015, management took away the camera that he used to perform his collateral duties as the unofficial photographer for the MEDIUM;
- xxii. On unspecified dates, management changed his duties;

³ Complainant asserted that this event occurred on September 10, 2014, not September 10, 2015. See Complainant’s Appellate Brief at 4-5.

⁴ For ease of reference, we have continued the Roman numeral numbering used by Complainant in his request to amend.

xxiv. On July 10, 2015, management denied his request for a spare computer, which he needed to utilize the projector; and

xxvii. On August 17, 2015, management initiated a Violence in the Workplace complaint against him and forced him to meet with the threat assessment committee the same day.

On February 9, 2016, the Agency informed Complainant that it would consider Complainant's 30 claims as additional evidence in support the three claims in his initial complaint. Complainant responded to the Agency's February 9, 2016 notice on March 10, 2016, wherein he expressed dissatisfaction with the manner in which the Agency handled his request to amend. In his email, Complainant requested that his request be processed as 30 individual claims. However, on March 31, 2016, the Agency again denied Complainant's request to process his additional claims as separate individual claims. The Agency subsequently began an investigation into claims 1 to 3.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant request a hearing.

On August 26, 2016, the Agency filed a motion seeking to procedurally dismiss the complaint pursuant to 29 C.F.R. § 1614.107(a)(1). In seeking to procedurally dismiss the complaint, the Agency argued that Complainant was not aggrieved because he had not offered any evidence that "any term, condition, or privilege of his employment changed." The Agency emphasized that "[t]he Complainant has not provided any evidence that he has suffered any harm, even a trivial one, arising from his claims in this case."

In opposition to the Agency's motion dated September 7, 2016, Complainant argued that claims based on reprisal need not qualify as an "ultimate employment action" or materially affect the terms, conditions, or privileges of employment. He emphasized that the prohibition on reprisal apply to adverse treatment that is based on retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.

On June 17, 2019, the assigned AJ proposed *sua sponte* to issue a decision without a hearing because Complainant had not suffered a materially adverse employment action or established a prima case of discrimination based on race or reprisal. See Notice of Proposed Summary Judgment, dated June 17, 2019. The AJ gave the parties until Friday, July 19, 2019 to respond to the notice. However, on June 25, 2019, the AJ vacated the June 17, 2019, notice and granted the Agency's August 26, 2016, motion to dismiss the matter pursuant to 29 C.F.R. § 1614.107(a)(1). The AJ granted the Agency's motion solely on the grounds that Complainant had failed to show that "he suffered any harm, was subjected to adverse treatment, or suffered adverse employment, as a result of the Agency's actions."

On July 30, 2019, the Agency issued a final order, which fully implemented the AJ's procedural dismissal, albeit under different grounds than the AJ.

In this regard, while the Agency acknowledged that the AJ had dismissed the complaint because there was no materially adverse employment action, the Agency noted that a complainant alleging a hostile work environment need not demonstrate the existence of an adverse employment action. To that end, the Agency emphasized that allegations of harassment, which may not constitute a claim individually, may nevertheless be sufficient to state a claim when considered collectively. As such, the Agency concluded that the AJ should not have dismissed the complaint due to the absence of an adverse employment action. Notwithstanding this determination, the Agency found that Complainant could not prevail on his hostile work environment claim because Complainant's allegations consisted of everyday workplace interactions that were insufficiently severe or pervasive to constitute a hostile work environment. Furthermore, the Agency found that Complainant could not show that the alleged incidents were due to discriminatory or retaliatory animus.

This appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant raises numerous contentions, challenging the AJ's decision. In this regard, Complainant contends that the AJ erred in denying him the opportunity to respond to the June 17, 2019, Notice of Proposed Summary Judgment. Complainant further alleges that the AJ, in failing to rule on Complainant's numerous motions, did not "uphold his role as an adjudicator." Finally, Complainant contends that the AJ based his decision on an incomplete ROI and reached his decision based on a too narrow application of "materially adverse employment action." He emphasizes that adverse actions need not qualify as "ultimate employment actions" or materially affect the terms or conditions of employment to constitute reprisal.

The Agency requests that the Commission affirm its final order.

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

We will first address Complainant’s contention that the AJ erred in finding that Complainant was not aggrieved. In this regard, Complainant contends that the AJ’s decision is based on a too narrow application of “materially adverse employment action.”

The regulations set forth at 29 C.F.R. §§ 1614.103 and 1614.106(a) provide that an agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. The Commission’s federal sector case precedent has long defined an “aggrieved employee” as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. See Samuel S. v Dep’t of the Army, EEOC Appeal No. 0120181463 (July 3, 2018) (citing Diaz v. Dep’t of the Air Force, EEOC Request No. 05931049 (April 21, 1994)).

Where a complainant has not alleged disparate treatment regarding a specific term, condition, or privilege of employment, the Commission will examine whether the complainant’s allegations, when considered together and assumed to be true, are sufficient to state a hostile or abusive work environment claim. See Estate of Routson v. National Aeronautics and Space Admin., EEOC Request No. 05970388 (February 26, 1999). Even if the alleged harassing conduct produced no tangible effects, a complainant may assert a cause of action if the discriminatory conduct was so severe or pervasive that it created a work environment abusive to complainant because of his race, sex, religion, national origin, age or disability. Rideout v. Dep’t of the Army, EEOC Appeal No. 01933866 (Nov. 22, 1995), req. for recons. den’d EEOC Request No. 05970995 (May 20, 1999) (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993)).

Furthermore, when a complainant alleges reprisal for prior protected EEO activity, he or she need not show that the agency’s conduct affected a term, condition, or privilege of employment or constituted an “ultimate employment action” such as hiring, firing, demotion, denial of promotion or leave, or adverse pay decisions. Rather, any allegation of adverse treatment that is based upon retaliatory motive and is reasonably likely to deter complainant or others from engaging in protected activity will suffice to state a claim. See Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999); EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove a set of facts in support of the claim which would entitle him or her to relief. Cobb v. Dep’t of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997). The Commission has also consistently held that agencies cannot ignore the pattern aspect of the claim and define the issues in a piecemeal manner.

See Ferguson v. Dep't of Justice, EEOC Request No. 05970792 (March 30, 1999); Meaney v. Dep't of the Treasury, EEOC Request No. 05940169 (November 3, 1994). The trier of fact must consider all of the alleged harassing incidents and remarks together in the light most favorable to the complainant, in order to determine whether they are sufficient to state a claim. Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (March 13, 1997).

Having reviewed the record, we find that the AJ erred in granting the Agency's motion to procedurally dismiss the complaint based on Complainant's purported lack of aggrieved status. While we note that the AJ procedurally dismissed the complaint pursuant to 29 C.F.R. § 1614.107(a)(1), our review of the Agency's final order shows that the Agency found that Complainant raised a harassment/hostile work environment claim based on race and reprisal for his prior protected EEO activity. Thus, even the Agency found that the AJ erred in requiring Complainant to show that the Agency took an adverse employment action against him, as no tangible adverse action is required in order to state a claim for race or reprisal-based harassment. See Pape v. U.S. Postal Serv., EEOC Appeal No. 0120082009 (June 17, 2008).

We find that Complainant has alleged a set of facts that, if true, may be sufficiently severe or pervasive to constitute an actionable hostile work environment claim. In this regard, while we acknowledge that the AJ found that claims 1 to 3 failed to render Complainant aggrieved, we note that Complainant raised 30 additional claims in his December 6, 2015, request to amend. Furthermore, on February 9, 2016, the Agency informed Complainant that it would consider Complainant's 30 claims as additional evidence in support the three claims in his initial claim of harassment. In these events, Complainant alleged that he was subjected to ongoing harassment consisting of excessive supervision/surveillance, changed duties, inaccurate performance evaluations, and false claims of misconduct and workplace violence. We conclude that these allegations, if true, sufficiently state a claim of harassment.⁵

As the Agency has not yet investigated the claims raised in Complainant's December 6, 2015 request to amend, we shall remand the entire complaint to the AJ for further development. On remand, the assigned AJ shall develop the record as necessary and afford Complainant a hearing, unless the AJ determines that a decision without a hearing is appropriate.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the Agency's final order, which fully implemented the AJ's finding that Complainant was not aggrieved. The Agency shall comply with the Order as set forth below.

⁵ As we have reversed the Agency's decision to fully implement the AJ's procedural dismissal, we decline to address the merits of the complaint at this time.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit of the Birmingham District Office within fifteen (15) calendar days of the date this decision becomes final. 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 AJ shall process the hearing request and hold a hearing in accordance with 29 C.F.R. § 1614.109, unless the AJ determines that a decision without a hearing is appropriate. The Agency shall then 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 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).**

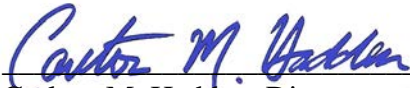
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

December 31, 2020

Date