



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]

Silas T.,¹
Complainant,

v.

John P. Roth,
Acting Secretary,
Department of the Air Force,
Agency.

Appeal No. 2019003996

Agency No. 8T0R17006TF18

DECISION

On June 12, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 13, 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 the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether preponderant evidence in the record establishes that Complainant was subjected to harassment and constructively discharged from employment based on sexual orientation.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a non-appropriated fund (NAF) NF-1101-IV Chili's Grill and Bar Manager at the Chili's restaurant located at the Agency's 18th Wing, 18th Mission Support Group (MSG), 18th Force Support Squadron (FSS) facility at Kadena Air Base in Okinawa, Japan. Complainant began working for the Agency at the Kadena Chili's on September 17, 2017.

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.

Complainant's first-line supervisor was the Acting Chili's General Manager (S1A), his second-line supervisor was the Community Services Flight Chief (S2), and his third-line supervisor was the Deputy Director for the 18th FSS, 18th MSG, 18th Wing (S3). The Chili's General Manager (S1B) was on leave for most of the time of events giving rise to this complaint.

Complainant is gay. According to Complainant, although he does not consider himself "flamboyant," people can generally tell that he is gay because of his voice and mannerisms. Report of Investigation (ROI) at 247, 266. According to Complainant, on October 5, 2017, he overheard S1A while on a phone call in the Chili's office. S1A was discussing a manager-in-training who physically assaulted an employee, and he described the situation as "fucked up like two boys kissing." ROI at 127. Complainant stated that he was sitting next to S1A while he was on the phone, although S1A stated that Complainant had not been in the office when the call started and that he did not know that Complainant was present.

Complainant alleged that S1A's comment made him feel uncomfortable at work, knowing that his supervisor was prejudiced against him because of his sexual orientation. Complainant averred that he did not say something to S1A on October 5, 2017, because he felt it would have made an uncomfortable situation worse. Complainant stated that he reported S1A's comment to a Human Resources Officer (HRO), who encouraged Complainant to report it to S2. On October 13, 2017, Complainant reported S1A's comment to S2 by email. In the email, Complainant stated that S1A's comment made him uncomfortable because he was gay and because the remark was a derogatory reference to his sexual orientation. S1A acknowledged that he made the comment in question. According to S2, S1A said that the comment was not directed at Complainant and was apologetic when asked about it. S1A averred that he was not aware of Complainant's sexual orientation until after he was counseled about making the comment.

Complainant alleged that, as far as he knew, no action was taken after he reported S1A's comment to S3. Complainant stated that his working relationship with S1A got progressively worse after he reported the remark to S2. The record reflects that S2 forwarded Complainant's email to S3 on October 13, 2017. According to S2, he was about to leave Okinawa for three weeks, so he asked his deputy, who was the Acting Flight Chief (AFC) while he was away, to investigate. According to the record, the AFC investigated Complainant's allegation and issued S1A an Oral Admonishment on October 17, 2017, which was placed in S1A's supervisory personnel file.

On October 26, 2017, Complainant attended a meeting as a witness. During the meeting, an Assistant Manager (C1) issued a Waiter (C2) a written counseling concerning dress code violations. Later the same day, C2's mother, who also worked at Chili's as a Waiter (C3), came to the restaurant. Complainant alleged that, while he and C1 were standing outside the restaurant, C3 verbally threatened to kill them. Complainant stated that C3 approached him, waved her finger an inch from his face, and said, "You can't write up my daughter, I'm going to fuck you up." ROI at 253. C1 called Security Forces (SF) to report the altercation, and Complainant estimated that seven SF officers came to the restaurant to address the situation. Complainant averred that C3 continued to threaten to kill him and C1 even after SF had been called.

According to Complainant, while C3 was speaking to SF personnel, she repeatedly referred to Complainant as a “faggot.” ROI at 254. Complainant alleged that he was humiliated by C3 using this derogatory term to refer to him in front of customers entering the restaurant, his coworkers, and the SF officers.

After the October 26, 2017, incident, C3 was removed from the Chili’s work schedule, pending an investigation. The AFC stated that C3 was told that she was being removed from the schedule until further notice. According to Complainant, he heard that C3 had come to the restaurant between October 28 and November 13, 2017, when he was not working and expressed that she wanted to get Complainant fired, sue him, or otherwise harm him. ROI at 53. Complainant alleged that C3 told his coworkers that she wished Complainant had been at the restaurant so she could do something, noting that her husband had a high rank in the military and that Complainant had “messed with the wrong person.” Id.

On November 13, 2017, S1A informed Complainant that C3 would be placed on the schedule and returning to work. Complainant stated that, based on her threats and harassing language, C3 should have been barred from returning to Chili’s as an employee or as a customer. Complainant alleged that, in the past, an employee who physically assaulted a heterosexual employee at work was terminated within four days of the incident being reported to S1A. Complainant stated that the assault against the heterosexual employee drew blood, whereas C3’s threats and comments towards him and C1 were verbal. On November 17, 2017, Complainant submitted his resignation, effective November 22, 2017. Complainant stated that he felt like he had no choice to resign because he was afraid of C3 and because S1A told him that she would be returning to the workplace. According to S2, when he heard C3 was on the Chili’s work schedule in November 2017, he directed management to take C3 back off the work schedule until the investigation was completed. S2 averred that, although he had contacted Human Resources to begin the process of terminating C3 less than a week after the incident, she could not be terminated until the investigation was complete.

On November 20, 2017, C2 and C3 came to Chili’s to eat lunch as customers while Complainant was working. Complainant alleged that C2 and C3 harassed him while they were in the restaurant. According to Complainant, C3 stared at him every time he entered the dining room, and C2 would snap her fingers every time Complainant walked past their table. Complainant alleged that C2 and C3 were trying to intimidate him and stated that he felt apprehensive that C3 would jump up and hurt him. According to Complainant, he asked S2 to have C3 removed from Chili’s, but S2 refused. S2 stated that C2 and C3 were at Chili’s as paying customers and that, based on Complainant’s description of what was happening, there was no basis for removing C2 or C3 from the restaurant. According to S2, although Complainant stated that C2 and C3 were staring at him and writing something down every time he walked by, there was no basis to remove them from the restaurant. According to the record, C3 was terminated on December 5, 2017. S2 stated that C3 did not work at Chili’s after the incident on October 26, 2017.

According to the record, C1 did not participate in the investigation of Complainant's EEO complaint because she no longer worked for the Agency and no forwarding contact information was available. ROI at 324. On January 11, 2018, the EEO Counselor interviewed C1. C1 told the EEO Counselor that on October 26, 2017, C3 threatened to kill her and Complainant, was very aggressive, and referred to Complainant as a "fag" while she was interviewed by Security Forces. ROI at 15. C1 also stated that, after the incident, management seemed more concerned with protecting C3 than it was with supporting her or Complainant. According to C1, C3 came to the restaurant a handful of times, threatening to sue or get Complainant and C1 fired and staring at Complainant and taking notes.

On March 14, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of sexual orientation (gay)² when:

1. On or about October 5, 2017, Complainant overheard S1A discussing an incident over the phone and said that it was "fucked up like two boys kissing";
2. On or about October 12, 2017, S2 did not enforce the zero-tolerance policy regarding unlawful discrimination when Complainant informed him about the remark S1A made on or about October 5, 2017;
3. On or about November 13, 2017, S1A informed him that C3 would be returning to work after she had verbally threatened to kill Complainant and called him a "faggot." A separate standard was applied to a separate incident when an employee who assaulted a heterosexual employee was fired immediately after the incident; and
4. On November 20, 2017, S2 refused Complainant's request to have C3 removed from the workplace when she came in and harassed Complainant while he was working.

Complainant opted for his EEO complaint to be processed through the Agency's Compressed, Orderly, Rapid, Equitable (CORE) pilot program. Pursuant to CORE procedures, the Department of Defense Civilian Personnel Advisory Service, Investigations and Resolution Division scheduled a CORE Fact Finding Conference on June 21, 2018, during which a transcript was produced. The CORE Fact Finder issued a CORE Recommended Decision based upon the Investigative File and the transcript. The aforementioned decision was provided to the Air Force Civilian Appellate Review Office (AFCARO), and AFCARO issued the instant final decision. The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

² In Bostock v. Clayton Cty., the Supreme Court held that discrimination based on sexual orientation or transgender status is prohibited under Title VII. 590 U.S. ___, 140 S. Ct. 1731 (2020); see also Baldwin v. Dep't of Transp., EEOC Appeal No. 0120133080 (July 15, 2015) (an allegation of discrimination based on sexual orientation states a claim of sex discrimination under Title VII because sexual orientation is inherently a sex-based consideration).

The instant appeal followed. Complainant did not submit a statement or brief in support of his appeal.

In response to Complainant's appeal, the Agency asks the Commission to affirm its final decision.

ANALYSIS AND FINDINGS

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 (EEO MD-110), 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").

Complainant alleged that he was subjected to harassment based on sexual orientation. To establish a claim of harassment a complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on his 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).

With respect to element (5), an employer is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 2270 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 2292-93 (1998). However, where the harassment does not result in a tangible employment action the agency can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. See Burlington Industries, supra; Faragher, supra; Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999).

This defense is not available when the harassment results in a tangible employment action (e.g., a discharge, demotion, or undesirable reassignment) being taken against the employee. In the case of co-worker harassment, an agency is responsible for acts of harassment in the workplace where the agency (or its agents) knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. Id.

We find that preponderant evidence in the record establishes that Complainant was subjected to harassment based on his sexual orientation. S1A, Complainant's first-line supervisor, admitted that he described a problematic situation as "fucked up like two boys kissing." On October 26, 2017, C3 threatened to kill Complainant, threatened to "fuck him up," and repeatedly shouted that he was a "faggot." The Commission has previously observed that the words "fag" and "faggot" have historically been used in the United States as highly offensive, insulting, and degrading sex-based epithets against gay men. See Couch v. Dep't of Energy, EEOC Appeal No. 0120131136 (Aug. 13, 2013). Additionally, the words "fag" and "faggot" are offensive, insulting, and degrading sex-based epithets historically used when a person is displaying the belief that a male is not as masculine or manly as the other person is. See, e.g., Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 870, 875 (9th Cir. 2001) (concluding that verbal abuse, including the use of the epithet "faggot," occurred because of sex).

Although C3 was not scheduled to work pending an investigation into the October 26, 2017, incident, she returned to the restaurant several times, threatening to sue Complainant, get him fired, or otherwise harm him. Shortly thereafter, S1A told Complainant that C3 would be added to the schedule and returning to work. On another occasion, C3 was allowed to remain at the restaurant as a customer even after Complainant reported that she and C2 were harassing him while working by staring at him, snapping their fingers every time he walked by, and writing something down. The statements of C1 and other witnesses substantiate Complainant's allegations that C3 harassed him based on sexual orientation. We find that the preponderance of the evidence establishes that Complainant was subjected to a hostile work environment based on sex and sexual orientation.

We must therefore determine whether there is a basis for imputing liability to the Agency. Regarding the harassment by S1A, Complainant's supervisor, we do not find that the Agency established its affirmative defense, so the Agency is vicariously liable for S1A's harassment. Although management investigated and issued S1A an Oral Admonishment on October 17, 2017, we find that the Agency has not established that it exercised reasonable care to prevent and correct promptly any harassing behavior. We find that less than 10 days after S1A was admonished, another employee, C3, threatened to kill Complainant while repeatedly shouting that he was a "faggot." We also find that the Agency is liable for C3's harassment of Complainant. Despite C3's egregious harassment of Complainant on October 26, 2017, C3 was allowed to return to the restaurant on various occasions, where she either told coworkers that she wished Complainant was there so she could harm him or where she harassed him while he was working. Management stated that there was no basis for removing C3 from the restaurant because she was a paying customer.

However, we note that an agency can be liable for the harassment of an employee by a non-employee, such as a customer. See, e.g., Complainant v. Tenn. Valley Auth., EEOC Appeal No. 0120123132 (May 14, 2015) (agency was liable for harassment of African-American employee including a noose on an agency truck even where it was not clear who placed the noose on the truck); Lemons v. Dep't of Justice, EEOC Appeal No. 0120081287 (Apr. 23, 2009) (agency was liable for sexual harassment of an employee by a prison inmate). Although the Agency may not have been able to immediately terminate C3 based on her conduct on October 26, 2017, allowing her to return to the workplace, where preponderant evidence establishes that she threatened Complainant, precludes the Agency from establishing its affirmative defense that it took immediate and appropriate corrective action.

Because Complainant resigned to get away from the harassment, we further find that his EEO complaint raises a constructive discharge claim. The central question in a constructive discharge case is whether the employer, through its unlawful discriminatory behavior, made the employee's working conditions so difficult that any reasonable person in the employee's position would feel compelled to resign. Carmon-Coleman v. Dep't of Def., EEOC Appeal No. 07A00003 (Apr. 17, 2002). The Commission has established three elements which a complainant must prove to substantiate a claim of constructive discharge: (1) a reasonable person in the complainant's position would have found the working conditions intolerable; (2) conduct that constituted discrimination against the complainant created the intolerable working conditions; and (3) the complainant's involuntary resignation resulted from the intolerable working conditions. See Walch v. Dep't of Justice, EEOC Request No. 05940688 (Apr. 13, 1995).

Here, Complainant stated that he felt that he had no choice but to resign when he heard that C3 was being added to the work schedule. C3 threatened to kill Complainant, stated to Complainant, "I'm going to fuck you up," and repeatedly referred to Complainant as a "faggot" in front of customers, his coworkers, and the SF officers. When C3 was removed from the schedule, she continued to stalk Complainant. Complainant stated that C3 had come to the restaurant between October 28 and November 13, 2017, when he was not working and expressed that she wanted to get Complainant fired, sue him, or otherwise harm him. C3 told coworkers that she wished Complainant had been at the restaurant so she could do something to him, noting that her husband had a high rank in the military.

The circumstances of this case establish that Complainant was constructively discharged from his employment. Given the threats of violence and use of derogatory language, a reasonable person in Complainant's position would have found his working conditions to be intolerable. Further, the intolerable working conditions plainly arose from unlawful discriminatory conduct based on Complainant's sexual orientation. And the record plainly supports a finding that Complainant's resignation was the result of these intolerable working conditions. Although the record reflects that C3 had not yet returned to the restaurant as an employee, Complainant submitted his resignation in response to learning that C3 would be returning to work, notwithstanding her continuing harassment of him and threats of doing him harm, even in her capacity as a restaurant customer.

Under the circumstances of this case, Complainant need not have waited for C3 to make good on her threats before feeling that he had no choice but to resign.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that Complainant has established that the agency unlawfully discriminated against him based on his sexual orientation when he was harassed and ultimately constructively discharged from his position. Accordingly, we REVERSE the Agency's final decision finding no discrimination and REMAND the matter to the Agency for further processing in accordance with this decision and the Order of the Commission, below.

ORDER

1. Within 60 days of the date this decision is issued, the Agency shall offer Complainant reinstatement to his former NF-1101-IV Chili's Grill and Bar Manager position, retroactive to the effective date of Complainant's resignation, November 22, 2017, with all the rights, benefits, and privileges of that position. The Agency shall afford Complainant 15 days to determine whether to accept reinstatement. Should Complainant reject the offer of reinstatement, Complainant's entitlement to back pay shall terminate as of the date of rejection.
2. Within 60 calendar days of the date this decision is issued, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant, pursuant to 29 C.F.R. § 1614.501. The back pay award shall reflect all career ladder promotions to which an employee in Complainant's position who performed in a fully successful manner was entitled. The Agency shall also restore any leave taken as a result of the harassment. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within 60 calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled, "Implementation of the Commission's Decision."
3. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.

4. Within 90 calendar days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages. The Agency shall allow Complainant to present evidence in support of his compensatory damages claim. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages no later than 30 calendar days after the completion of the investigation.
5. Within 60 calendar days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the responsible management officials.³ 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 employment, then the Agency shall furnish documentation of their departure date(s).
6. Within 90 calendar days of the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive EEO training to the responsible management officials, with an emphasis on sexual orientation discrimination and on management's responsibility to respond to allegations of harassment.
7. Within 30 calendar days of the date this decision is issued, the Agency shall post a notice, as provided in the statement entitled "Posting Order."

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.\

POSTING ORDER (G0617)

The Agency is ordered to post at its 18th Wing, 18th Mission Support Group, 18th Force Support Squadron facility at Kadena Air Force Base in Okinawa, Japan copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

³ We note that "responsible management officials" includes any agency personnel responsible for the discrimination against Complainant, regardless of whether such persons occupy management or non-management positions.

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 (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/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 receipt of this decision. 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 (M0920)

The Commission may, in its discretion, reconsider this appellate decision if 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, a 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

May 24, 2021

Date