



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

[REDACTED]
Irene M.,¹
Complainant,

v.

Thomas W. Harker,
Acting Secretary,
Department of the Navy,
Agency.

Appeal No. 2020001286

Hearing No. 480-2018-00054X

Agency No. 16-00015-03847

DECISION

The Equal Employment Opportunity Commission (EEOC or Commission) accepts Complainant's appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 12, 2019 final order concerning an 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.

BACKGROUND

During the period at issue, Complainant worked for the Agency as a IT Specialist/ Senior Web/Data Developer, GG-2210-12, at the Naval Intelligence Activity, Joint Interagency Task Force West (JIATF-W) in Camp H.M. Smith, Hawaii.

On December 16, 2016, Complainant filed a formal EEO complaint claiming that the Agency discriminated against her based on sex (female) and in reprisal for prior protected EEO activity.

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.

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

On May 14, 2019, the AJ issued a document entitled Order Granting in Part Agency's Motion for Summary Judgment and Order Scheduling Initial Pre-Hearing Conference. Therein, the AJ identified the subject claims as follows:

1. In or about January 2016, Complainant became aware that her web/database projects were given to another group, to include Complainant's SharePoint projects.
2. In or about March 2016, other male employees were given private offices while Complainant's request for a quiet office space has been denied since September 2015.
3. In or about March 2016, during a meeting with the Deputy/Chief of Staff, it was announced that a newly arrived male military personnel would be taking over Complainant's project.
4. In or about March 2016, after moving into an empty office, three management officials, including her supervisor ("S1"), did not allow Complainant to close her office door.
5. On April 6 2016, S1 verbally counseled Complainant for going outside the chain of command. Complainant reported her allegations of being harassed and discriminated against based on her gender to the Chief of Staff ("COS").
6. In or about May 2016, Complainant's request to attend the PTCN Team Leader's Conference was denied.
7. On or about June 2016, during Complainant's vacation in France, S1 called and asked Complainant to change her vacation plans. In addition, Complainant's request for travel reimbursement expenses due to change in her schedule were denied.
8. In or about July 2016, Complainant became aware that a male co-worker who recently attended training was not asked to sign a one-year commitment to the Agency while Complainant was made to sign a one-year commitment when she first arrived in JIATF-W.
9. On August 3, 2016, Complainant's co-worker yelled at her uncontrollably. Complainant reported the incident, but nothing was done to address the behavior of the co-worker.

10. On August 11, 2016, Complainant was excluded from all emails regarding a project. In addition, another supervisor ("S2") told Complainant that she needs to step back and allow a co-worker ("CW1") (a SPAWAR contractor) to do Complainant's work so that they can justify her position with SPAWAR.
11. On August 15, 2016, S2 asked Complainant to give up her roles and responsibilities to CW1 so that she can work on international projects.
12. On August 31, 2016, Complainant reported to S1 and S2 about CW1's inappropriate behavior of stalking her, but nothing was said or done to fix the matter.
13. On September 6, 2016, Complainant was asked to move out of her office to a common desk.
14. On or about September 15, 2016, S1 and S2 told Complainant that she must work with CW1 even after Complainant reported CW1's inappropriate behavior of stalking her.
15. On September 21, 2016, Complainant was issued a Letter of Reprimand for deliberate failure to follow instructions and insubordination.
16. On September 23, 2016, Complainant's request to attend Cyber Security training was denied.
17. On October 13, 2016, S1 sat next to Complainant's desk and started having a conversation with S3 about why it is not a "big deal" to get a Letter of Reprimand.
18. On November 4, 2016, Complainant went on leave without pay for four weeks.
19. On December 6, 2016, while on leave, Complainant became aware that S1 gave a SPAWAR contractor all her administrative privileges;
- 20(a). On December 9, 2016, during a one-on-one meeting regarding Complainant's fiscal year 2016 (FY 16) performance evaluation, S1 threatened Complainant by saying, "I have some things against you that I am going to use."
- (b). In addition, Complainant received significantly low scores including a 2 out of 5 for personal leadership and integrity.

21. On December 20, 2016, S3 asked Complainant, “You don’t seem to be scared of anyone...why are you not scared of anyone?” In addition, Complainant was asked by S3 if she plans to stay or leave JIATF-W.²

The record reflects further that Complainant raised a claim, not numbered, regarding being bumped in a hallway in 2018 (hereinafter referred to as “the bumping claim”).

The AJ held a hearing on July 25, 2019, and issued a decision on October 8, 2019.

In the AJ’s decision, the AJ first noted that six claims were before him for hearing: Claims 17, 18, 20(a), 20(b), 21, and the bumping claim. The AJ determined that all the remaining claims, referenced above, “were dismissed on summary judgment, by Order dated May 14, 2019, which I incorporate by reference in this Decision.”

On the six claims that were the subject of the hearing, the AJ heard testimony from seven witnesses, including Complainant. In a decision dated October 8, 2019, the AJ found no discrimination or retaliation regarding Claims 18, 20(a), and the bumping claim. However, the AJ found Complainant was subjected to unlawful retaliation for engaging in protected EEO activity regarding claims 17, 20(b), and 21, and awarded Complainant \$6,000 in compensatory damages, among other things. The Agency issued its final order fully implementing the AJ’s decision.

The instant appeal from Complainant followed. Complainant does not submit any arguments on appeal.

ANALYSIS AND FINDINGS

Claims That Were the Subject of the Hearing

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ’s conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ’s credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

² For ease of reference, the Commission has re-numbered the claims.

In Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), that harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of the complainant's employment. Thus, not all claims of harassment are actionable. As noted by the Supreme Court in Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998): “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment’.”

AJ finding of no discrimination or retaliation: claim 18, 20(a) and the bumping claim

The AJ properly found no evidence of discrimination or unlawful retaliation with regard to claims 18, 20(a), and the bumping claim. The AJ’s determination was based on the record and testimony during the hearing. For Claim 18, the conduct complained of prior to Complainant taking leave was not so severe as to cause the reasonable employee to take four weeks of unpaid leave. Additionally, this leave was taken in November 2016, near Thanksgiving, during a period when Complainant’s family was in town. Regarding Claim 20(a), the record and testimony did not support an inference of the conversation having occurred. Finally, for the claim that S1 intentionally bumped Complainant in a hallway, the AJ found, and a review of the record supports, that the incident was too remote in time, occurring in 2018, to create a temporal nexus to the other hostile work environment claims at issue in the instant formal complaint. Moreover, the AJ was not convinced that the incident occurred as Complainant had alleged, or that the action was motivated by discriminatory or retaliatory animus. The record supports the AJ’s findings and Complainant submits nothing to counter those findings.

AJ findings of unlawful retaliation: Claim 17, 20(b) and 21

The AJ properly determined that Complainant was subjected to unlawful retaliation for engaging in prior EEO activity with regard to Claims 17, 20(b), and 21. The AJ’s determination was based on the record and testimony, including the AJ’s impression of Complainant’s level of distress when discussing the matter. The AJ found that S1 and S3 were aware of Complainant’s EEO activity and found that the conduct by S1 and S3 in Claims 17, 20(b), and 21 were meant to dissuade Complainant from pursuing her EEO complaint. We find it appropriate to quote the AJ verbatim on this point:

The conduct in Claims 17, 20(b), and 21 was designed to dissuade Complainant from pursuing her EEO complaint. And, when taken together, [the conduct] would dissuade a reasonable employee from engaging in protected activity. Liability also attached because management subjected Complainant to the tangible action of the “2”rating [in claim 20(b)]. And the Agency has not otherwise proven a defense to liability.”³

³ The AJ noted that because of his finding of unlawful retaliatory animus with regard to these incidents, there was no need to determine whether the conduct was also based on sex.

The AJ made the following individual determination on these three claims. Regarding Claim 17, the AJ found that soon after learning of Complainant's EEO activity, an Agency supervisor "inexplicably" came to sit aside Complainant's work station though other work stations were available. The supervisor engaged in a discussion with another supervisor regarding how the issuance of reprimands was "no big deal." The AJ concluded that viewed together, these matters reflected a clear attempt to discourage Complainant from formalizing or otherwise pursuing EEO complaints about reprimands, or regarding other issues.

Regarding Claim 20(b), the AJ found that reprisal played a role in the "2" rating. Specifically, the AJ determined that *before* EEO activity, an Agency supervisor recommend merely a reprimand after determining that Complainant made a coding error. The Agency determined, however, that *after* Complainant's EEO activity, the supervisor recommended a "1" rating for "personal leadership and responsibility," even though there was no reason to doubt Complainant's leadership. The AJ noted that the "2" rating was "inappropriately low" because the Agency later changed the rating to a "3" rating. Regarding Claim 21, the AJ found that Agency management "peppered" Complainant with comments about the negative effects that Complainant's complaints were having on her and on her co-workers.

The AJ ordered injunctive relief, including ongoing training for the responsible management individuals semi-annually for two years, expungement of the "2" rating for FY 16, and a posting notice. The AJ also ordered compensatory damages of \$6,000. A review of the record and the AJ's decision support the remedial measures taken.

Remaining Claims Summary Judgment

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.

To successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Here, neither before the AJ nor on appeal has Complainant pointed with any specificity to particular evidence in the investigative file or other evidence of record that indicates such a dispute. We again note that she has provided no argument whatsoever in support of her appeal.

We find that summary judgment was appropriate concerning all of the claims which were not part of the hearing. The AJ examined the record and made the determination that the evidence was insufficient to establish an inference of discriminatory animus in any of the actions taken by management or coworkers.

The AJ grouped these claims into four categories. The first group concerned task assignments (Claims 1, 3, 10-11, 14, and 19), office arrangements (Claims 2, 4, and 13), and various miscellaneous issues (Claims 6-8 and 16). The AJ found that the record had been developed sufficiently to determine that there was not enough evidence to refute the Agency's stated reasons for the decisions. The AJ determined that Complainant did not point to evidence to disprove that tasks were distributed according to Agency needs. The AJ examined the financial rationale provided by Agency regarding Complainant's trainings. He found that Complainant was allowed to attend the Team Leader's Conference, as well as the PTCN conference. She was asked to sign the one-year commitment due to the cost of her initial training, and she was denied the Cyber Security training because of funding.

The AJ also found that Complainant's proffered comparators were not similarly situated because they had different job duties, different supervisors, they were of higher ranks, and/or took different trainings. The AJ also found that Complainant does not present evidence to connect Counseling, Reprimand, or Evaluation to her protected bases. The AJ then addressed the hostile-environment claims involving co-workers and management, which the AJ finds the matters concerned regular disagreements, and not discrimination. The AJ also found that, in the claims regarding one co-worker yelling at Complainant and another stalking, Complainant did not demonstrate how either co-workers' conduct was different toward her than toward anyone else. The AJ also found that Complainant did not establish a nexus between her protected bases and the conduct of either co-worker toward her.

We find Complainant's silence on appeal significant given the spectrum of determinations made by the AJ. To wit, the AJ found numerous claims appropriate for summary judgment in the Agency's favor. The AJ also held a hearing on six remaining claims, finding no discrimination in three claims, but finding discrimination in three other claims. Finally, the AJ provided an order of remedies relating to the discrimination findings.

The Complainant's appeal, due to not making any arguments or submitting a brief, make it unclear whether she found issue with the injunctive or compensatory relief ordered. As such, we AFFIRM the AJ's decision both on the findings regarding no discrimination of three claims (claims 18, 20(a) and the "bumping claim:), the finding of discrimination on three other claims (claims 17, 20(b) and 21), and the summary judgment decision on the remaining claims. The Agency shall comply with the following Order.

ORDER

Within sixty calendar days from the date this decision is issued, the Agency is ORDERED, to the extent it has not already done so, to take the following actions regarding claims 17, 20b, and 21:

1. Provide to each responsible management official one hour of live training, semi-annually, for the next two years, on unlawful discrimination under the federal EEO laws, with emphasis on sex and reprisal.
2. Expunge from all official and unofficial records documents reflecting Complainant's "2" rating for FY 2016.
3. Pay the Complainant \$6,000.00 in non-pecuniary damages.
4. Take corrective and preventative measures to ensure that discrimination against Complainant and against any other employee will not occur.

POSTING ORDER (G0617)

The Agency is ordered to post at its Camp H.M. Smith, Hawaii facility 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. 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).

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 (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

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.

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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

February 2, 2021

Date