



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

[REDACTED]
Vickie T.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Western Area),
Agency.

Appeal No. 2021000988

Agency No. 4W480000320

DECISION

Complainant timely appealed with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's September 21, 2020 dismissal of her 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. and the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d) et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Packer/Warehouseman, Level 5, at the Agency’s Material Distribution Center in Topeka, Kansas.

On August 31, 2020, Complainant filed a formal EEO complaint alleging that the Agency subjected her to discrimination on the basis of reprisal for prior protected activity² when:

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 filed Grievance No. 07212020 on April 21, 2020, which was pending at Step 3 when she filed the instant complaint. She also cites her status as the Vice President of the Local Union, her related Union activities, and an April 2020 FMLA request as the underlying protected activity for her retaliation claim.

1. on April 21, 2020, and continuing, her Supervisor ("S1") moved her out of her preferred duty assignment in retail, where she had been working for over 7 years, to the packing bay; and
2. on unspecified dates, S1 yelled at her in front of her coworkers on the workroom floor.

The Agency dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. The instant appeal followed.

ANALYSIS AND FINDINGS

Under the regulations set forth at 29 C.F.R. Part 1614, an agency shall accept a complaint from an 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. 29 C.F.R. §§ 1614.103, .106(a). 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. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). If complainant cannot establish that s/he is aggrieved, the agency shall dismiss a complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

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'." See also, Phillips v. Dep't of Veterans Affairs, EEOC Request No. 05960030 (July 12, 1996); Banks v. Dep't of Health and Human Servs., EEOC Request No. 05940481 (Feb. 16, 1995).

Similarly, as Complainant is raising a reprisal claim, the Commission has stated that adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. Lindsey v. United States Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999). Instead, claims based on statutory retaliation clauses are reviewed "with a broad view of coverage. Under Commission policy, a complainant is protected from any retaliatory discrimination that is reasonably likely to deter... complainant or others from engaging in protected activity." Maclin v. United States Postal Serv., EEOC Appeal No. 0120070788 (Mar. 29, 2007).

Claim 1

The EEO complaint process should not be used to challenge routine instructions directing employees to perform work within their crafts and job descriptions or to express a preference for a different policy or practice than the one implemented by management. Miller v. United States Postal Serv., EEOC Appeal No. 0120113996 (Feb. 3, 2012). While an employee may prefer to perform certain duties, among others within his or her work assignment, or may have a different idea about how operations should be run, these are not issues which should be pursued in the EEO complaint process since decision makers in the complaint process cannot substitute their judgment on how to run the day to day operations of an Agency for that of the managers involved. Id.

In its final decision, the Agency emphasized that S1 acted within the scope of his supervisory authority when he reassigned Complainant's work duties from an assignment she preferred to perform, to other duties that still fell within Complainant's job/bid duties. The Agency further reasoned that a change in a complainant's preferred duties constituted routine instructions directing Complainant to perform work within her craft, and therefore failed to state a claim of harassment. While this is often the case, we disagree in the instant complaint.

Complainant argues that S1's action was outside the standard practices within the facility, which recognized seniority even with respect to in-craft assignments. She was the most senior worker in the Retail Section, and had been there for seven years, and the workers in the packing bay were all relatively new employees. Additionally, S1 replaced Complainant with two workers with less seniority. In rare instances, we have found that challenges to "routine work assignments" state a claim. See, e.g. Hamilton v. United States Postal Serv., EEOC Appeal No. 0120113457 (Nov. 25, 2011) (reassignment of duties stated a claim where, contrary to the agency's assertion that its reassignment of the complainant from a modified work assignment was a "routine work assignment," it went well beyond the type of daily changes in work assignments made by the Agency, as the complainant held the assignment since 2002 and it was provided to accommodate her work-related disabling condition). While the change to Complainant's daily assignment was less physically impactful than that of the complainant in Hamilton, we find that it applies, considering the duration of time Complainant held the preferred assignment, and that the reassignment of duties conflicted with typical practice within the facility, given the broad view of coverage applied to retaliation complaints. We find Claim 1 states a claim of harassment.

We also find that the allegation in Claim 1 states a claim of reprisal. Assuming Complainant engaged in protected EEO activity as alleged, we find the Agency's response to that activity, removal from a duty assignment Complainant held for seven years, is reasonably likely to deter Complainant and others from engaging in additional protected EEO activity.

Claim 2

Claim 2 lacks the necessary specificity to state a claim of harassment because, beyond the bare assertion that she was yelled at, Complainant failed to allege facts sufficient to show that she suffered a harm or loss with respect to a term, condition or privilege of employment for which there is a remedy. See Hayes, v. United States Postal Serv., EEOC Appeal No. 0120090119 (Jun. 29, 2010), see, e.g. Carlan v. Dep't of the Treasury, EEOC Appeal No. 01A32447 (Aug. 1, 2003) (finding failure to state a claim due to lack of specificity where "Complainant has not identified when the events occurred, what happened, how she was directly disadvantaged, or how these matters altered the terms, conditions, or privileges of her employment"). Moreover, have previously found that even with sufficient specificity, allegations that a supervisor yelled at a complainant are typically "common workplace occurrences," that while unpleasant, did not constitute harassment. See Carver v. United States Postal Serv., EEOC Appeal No. 01980522 (Feb. 18, 2000).

Likewise, even applying the broad view of coverage afforded to allegations of reprisal, the allegation in Claim 2 is not likely to deter Complainant or others from engaging in additional protected EEO activity.

CONCLUSION

Accordingly, the Agency's dismissal of Claim 1 is REVERSED, and its dismissal of Claim 2 is AFFIRMED.

Claim 1 is hereby REMANDED for processing in accordance with the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claim (Claim 1) in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

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 (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

February 22, 2021

Date