



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

[REDACTED]
Felton Z.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2019002311

Hearing No. 443-2017-00156X

Agency No. 200J05842016104251

DECISION

Complainant timely 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 November 20, 2018 final order 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 order and REMANDS the matter for a hearing.

ISSUE PRESENTED

The issue presented is whether the Equal Employment Opportunity Commission Administrative Judge (AJ) properly issued a decision without a hearing.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Computed Tomography (CT) Technologist, GS-9, at the Agency's Iowa City Health Care System facility in Iowa City, Iowa. Complainant's first-line supervisor was the Supervisory Radiology Technologist (S1). During the same period, Complainant worked with two CT Technologists (CW1 and CW2) and a Lead Technologist (CT Lead). It was well-known throughout the Radiology Department that Complainant is gay.

On October 4, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against and subjected him to harassment on the bases of sex (LGBT male²) and reprisal for protected EEO activity (protected activity beginning in January 2016) under Title VII of the Civil Rights Act of 1964 when:

1. On January 28, 2016, his first-line supervisor (S1) offered him an alternative to change his clothes in the bathroom instead of the men's locker room because staff complained;
2. On May 10, 2016, management denied his on-call pay;
3. On June 23, 2016, an employee could eat in the work area although Complainant was not allowed to do so;
4. On July 7, 2016, Complainant was assigned to cover another work area, and returned to his primary work area to find that his duties had not been reassigned;
5. On October 4, 2016, he received a fully successful rating on his performance evaluation for FY 2016; and
6. On April 27, 2017, Complainant received an admonishment.³

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).

³ The original claim was that on March 6, 2017, Complainant received a proposed reprimand. However, prior to the completion of the investigation, the proposed reprimand was reduced to an admonishment. The claim was not accepted in the Initial Conference Order and was not enumerated as a claim in the AJ's decision.

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

During an initial conference, the AJ determined that claim 2 was a timely raised discrete act while claim 5 was untimely raised and only considered as part of the harassment claim. Prior to a hearing being held, the Agency submitted an August 24, 2018, motion for summary judgment and Complainant submitted a response in opposition. The Agency filed a reply to Complainant's response. Over Complainant's objections, the AJ assigned to the case granted the Agency's motion and issued a decision without a hearing, in the Agency's favor, on November 7, 2018.

AJ's Decision

In her decision, the AJ determined that Complainant failed to establish that the incidents complained of were severe or pervasive enough to rise to the level of harassment, constituted separate acts of discrimination under the disparate treatment theory, or were calculated to deter EEO activity.

Regarding claim 1, the AJ found that Complainant provided no evidence beyond his own belief that S1 was satisfying the wishes of Complainant's coworkers as Complainant alleged. The AJ noted that Complainant acknowledged that S1 offered him the opportunity to change in an alternative area and did not mandate any area. The AJ further accepted S1's explanation that he sought to address the point that Complainant should not change in the storage room adjacent to the CT area.

For claim 2, the AJ found that Complainant provided no evidence that the call coverage procedures were manipulated to benefit his coworkers or that they were treated more favorably. Similarly, the AJ determined that with respect to claim 3, Complainant's allegations that the work rules were initiated to appease his coworkers was unsubstantiated.

As for Complainant's allegations that he was subjected to hostile work environment harassment in relation to claims 4 and 5, the AJ determined that the incidents were routine work assignments, instructions, and admonishments that were neither severe nor pervasive enough to engender a hostile work environment. The AJ noted that S1 indicated that Complainant's coworkers "do the best they can" to complete assignments and that Complainant failed to notify S1 of the incident or alleged harassment. With respect to Complainant's FY 2016 evaluation, the AJ stated that Complainant argued that harassment by his coworkers somehow justified rude treatment toward his coworkers.

The AJ noted that C3 testified that CW1 and the CT Lead referred to Complainant as a "gay fucker," "gay bastard," and more than once as a "fag." However, the AJ found that Complainant provided no evidence that he overheard any of the comments, that they were directed at him, or that S1 made such comments.

Finally, the AJ stated that assuming, *arguendo*, that Complainant raised a genuine issue of material fact to show discriminatory animus, he failed to show that the Agency's actions were severe and pervasive enough to alter the conditions of the work environment.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the AJ erred in finding that there were no genuine issues of material fact or issues of credibility. In arguing that the AJ erred in finding no discriminatory animus, Complainant argues that the decision was dismissive of the discriminatory animus from the CT Lead and ignored discriminatory animus of CW1. Complainant asserts that he was aware of the homophobic statements that were made by his coworkers and that witness testimony supports his allegation that his coworkers mistreated and ignored Complainant and made comments to influence S1 to act in a manner that altered Complainant's work environment. Complainant states that the AJ's decision erred in concluding that there was no alteration to the work environment because it improperly marginalizes the impact of the downgrade in his performance review. Complainant adds that the downgrade was based upon complaints from the CT Lead and CW1, both of whom had demonstrated discriminatory animus toward him. Complainant further maintains that the record includes ample evidence showing harassment and bullying by the CT Lead and another coworker based upon his sexual orientation. Complainant avers that the harassment occurred repeatedly over several months and was accepted and facilitated by S1. Complainant further asserts that the record establishes that he was compelled to use Family Medical Leave Act (FMLA) leave, seek professional counseling, and take medication for anxiety due to the ongoing discriminatory treatment.

In response to Complainant's appeal, the Agency contends that Complainant never brought forth any evidence as to where he overheard any of the alleged homophobic comments, that they were directed at him, or that S1 made such comments. The Agency reasserts that comments not directed at Complainant are not considered evidence of discriminatory animus. The Agency reiterates that Complainant failed to provide evidence that S1 was satisfying the wishes of his coworkers regarding claim 1. The Agency maintains that there was no evidence that procedures were manipulated with respect to claim 2 and that claim 3 pertained to routine work assignments, instructions, and admonishments that were not severe or pervasive enough to engender a hostile work environment. The Agency further asserts that Complainant failed to provide substantial evidence that the downgrade to "fully successful" was a result of a hostile, severe, or pervasive alteration of the work environment.

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 Chap. 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 first determine whether the AJ appropriately issued the decision without a hearing. 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. An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003).

We have carefully reviewed the record and find that it is inadequately developed to the extent that the investigator interviewed S1 regarding all claims but failed to obtain additional witness statements for any other witness regarding Complainant's allegations except for claim 6.

Further, the AJ improperly determined that there are no genuine issues of material fact or credibility issues that warranted a hearing. Complainant asserted that he was subjected to a hostile work environment when his coworkers mistreated and ignored him and made comments to influence S1. There are genuine issues of whether comments made by Complainant's coworkers substantiate the allegation of a discriminatory motive.

According to the AJ, Complainant's response to the Agency's motion for summary judgment included testimony from CW3 that the CT Lead referred to Complainant as a "gay fucker," CW1 referred to Complainant as a "gay bastard," and more than once CW1 referred to Complainant as a "fag."⁴ Complainant asserted that these coworkers had discriminatory motive in their complaints to S1 and that CW1 informed him that "some" coworkers were uncomfortable with Complainant changing in the men's locker room. The testimony raises a genuine issue of material fact about whether discriminatory motive existed in relation to claim 1. The AJ stated that Complainant presented no evidence that he overheard any of the comments, that they were directed at him, or that S1 made such comments. But there are genuine issues as to whether the comments contributed to a hostile work environment by poisoning the atmosphere with disrespect toward Complainant. Complainant provided testimony that "[S1] did nothing to intercede or otherwise attempt to make the CT environment more collegial and to make the CT environment more accepting of [Complainant]." Moreover, to the extent that the comments did get back to Complainant, as he asserts, they would contribute to an overall atmosphere of harassment aimed at Complainant.⁵

As for claim 1, Complainant alleged that prior to January 2016, he and another coworker changed their clothes in a storage area adjacent to the worksite for several years. Complainant further alleged that management officials subsequently informed employees that they must change clothes in their respective gender-designated locker rooms, but that S1 told him that he would be allowed to change clothes in a place other than the men's locker room where he would be comfortable. S1 averred that he received a complaint from CT staff that Complainant was changing in the CT suite and that his intent in offering Complainant an alternative location was to stop Complainant from changing in the CT suite. Report of Investigation (ROI) at 82. Upon review of the record, we find that the record is devoid of evidence regarding the timing of S1's conversation with Complainant and S1's knowledge of Complainant changing in the CT suite prior to the complaint from his coworkers. The record does not indicate whether other employees were offered alternative changing areas or whether other employees were given the same instruction to stop changing in the CT work area.

S1 indicated that he discussed the issue of Complainant changing with other management officials and the Agency EEO office. This testimony raises concerns of whether discriminatory motive existed in relation to claim 1 when considering the comments made by Complainant's coworkers.

⁴ Notably, this testimony was not included in the report of investigation and raises a question as to whether the record was properly developed and appropriate for summary judgment disposition.

⁵ There is no requirement that discriminatory comments be directed at or overheard by a complainant in order to have probative value. If, for example, a coworker described a complainant with a racial epithet, out of the complainant's hearing, we would still consider whether the use of the racial epithet substantiated the existence of discriminatory animus on the part of the coworker.

Because Complainant never expressed discomfort in changing in the men's room or requested any accommodation following the Agency directive that employees should change in their gender-designated locker rooms, it is unclear why S1 escalated the matter to the EEO office if Complainant was simply in violation of the Agency's policy that employees must change in the locker rooms. The record is unclear on the catalyst for S1's actions with respect to claim 1 and requires further development. Moreover, we find that a genuine issue of material fact exists as to whether the complaints regarding Complainant's changing area were due to the location or to Complainant's sexual orientation.

With respect to claim 5, the AJ credited S1's assertion that Complainant was rated "not meeting" in Customer Service because he was discourteous to coworkers, did not promote teamwork, and that S1 had concerns about Complainant's anger toward his coworkers. The AJ stated that Complainant's "hostility is evident by his lack of communication regarding work related issues" and went on to address an admonishment that took place outside of the rating period. The AJ determined that Complainant failed to show that he was courteous to his coworkers while Complainant proffered that he often covered shifts for others. ROI at 71. The investigator failed to question S1 on whether he had discussions with Complainant regarding the alleged deficient conduct prior to the issuance of the rating or obtain witness affidavits regarding Complainant's relationships in the workplace. Further, while the investigator questioned S1 on whether he felt the rating was fair, the investigator failed to ask S1 the specific reasons for the rating, examples of the alleged deficiencies, or why the rating differed from Complainant's prior evaluations in the deficient area. Complainant maintained that his coworkers were treated more favorably, and the record does not indicate whether Complainant's coworkers were similarly downgraded for using derogatory terms in reference to Complainant.

It appears that, in granting the Agency's motion for summary judgment, the AJ either erred in failing to consider Complainant's account of the facts, instead solely relying on the Agency's account, or failed to consider the events as a whole regarding Complainant's claim of harassment. The AJ determined that Complainant was angry at his coworkers but dismissed Complainant's history of interactions with his coworkers and his allegation that the work environment created by his coworkers, and allegedly enabled by S1, resulted in ostracism and an intolerable work environment.

Finally, the AJ failed to discuss Complainant's reprisal claim, which we find troubling in light of comments made by the Chief of Diagnostic Imaging during the investigation of the instant matter in April 2017. Specifically, the Chief of Diagnostic Imaging stated that he "[was] trying very hard to forgive [Complainant] for making what [Complainant] knows full well is a false allegation..." ROI at 94. We find these comments, and the investigator's failure to question the Chief of Diagnostic Imaging regarding reprisal, particularly troubling considering Complainant's reprisal claim, as the Chief of Diagnostic Imaging was the deciding official in Complainant's proposed reprimand in March 2017. Comments such as these have the potential to deter employees from engaging in EEO activity.

We note that the hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have “a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses.” See EEO MD-110, Chap. 7 at I.; see also 29 C.F.R. § 1614.109(e). “Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims.” Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (Mar. 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (Oct. 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (Apr. 25, 1995). In summary, there are simply too many unresolved issues which require an assessment as to the credibility of S1, Complainant's coworkers, and Complainant, himself. Therefore, judgment as a matter of law for the Agency should not have been granted.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission REVERSE the Agency's final action and REMANDS the matter to the Agency in accordance with this decision and the Order below.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit of the Milwaukee Area 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 Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall 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 (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

June 2, 2021

Date