



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

[REDACTED]
Merlin W.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Immigration and Customs Enforcement),
Agency.

Appeal No. 2019004821

Hearing No. 480-2016-00930X

Agency No. HS-ICE-24887-2015

DECISION

JURISDICTION

On July 11, 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 June 6, 2019, 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.

ISSUE PRESENTED

The issue presented herein is whether it was appropriate for the Equal Employment Opportunity Commission Administrative Judge to have 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 Special Agent, GS-1811-13 at the Agency's Border Enforcement Security Task Force (BEST) in Long Beach, California. On November 24, 2015, Complainant contacted an EEO Counselor and filed a formal EEO complaint on November 24, 2015, alleging that the Agency discriminated against him on the basis of sex and subjected him to harassment on the basis of sex (male/sexual orientation)² when:

1. on October 31, 2014, Complainant was reassigned to the Long Beach office after having moved offices from Orlando, Florida, to Los Angeles, California, under the SFLR program;
2. in November 2014, Complainant was reassigned to another group at an offsite office after a coworker made a false accusation of sexual harassment against him;
3. in April 2015, Complainant was subjected to a physical assault and berated by a Supervisory Border Patrol Agent (SBPA1) from another Agency. Just prior to and after the assault, SBPA1 stated to Complainant, "Hey, Dick, are you going to read your email?" "You'd better not be calling me," and "No motherfucker, you need to understand who you report to and you need to learn your role around here;"
4. in April 2015, Complainant was placed on probation and berated by the Deputy Special Agent in Charge (DSAC1);
5. since April 2015, management has not addressed Complainant's ongoing harassment concerns;
6. in August/September 2015, Complainant was harassed and berated by coworkers. He was told "Get the 'fuck' out." Complainant was called a "pussy" and told to "go report it" to his Assistant Special Agent in Charge (ASAC1). He discovered a tampon in his sport coat; and
7. on September 21, 2015, management called Complainant to a meeting under false pretenses. During the meeting, Complainant outlined his concerns about his dislike and distrust of management and the name-calling (e.g., eunuch) and harassment he had received.

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).

At the conclusion of the investigation into Complainant's allegations, 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. Over Complainant's objections, the AJ assigned to the case granted the Agency's March 26, 2018, motion for a decision without a hearing. The AJ issued a decision without a hearing on May 3, 2019.

The AJ stated that the following facts were not in dispute.

Regarding Claim 1, Complainant alleged that prior to reporting to duty, he was reassigned to the Long Beach Gang Group which also reported to the Long Beach Public Safety Division. Complainant explained that his reassignment was based on information received during a reference check that the Acting ASAC (AASAC1) conducted. Specifically, Complainant asserted that DSAC1 from the Agency's Tampa, Florida, office told AASAC1 that DSAC1 had received feedback from Complainant's management chain that Complainant was an experienced and very competent investigator, but that Complainant had abrasive interactions with internal and external coworkers.

Complainant stated that according to AASAC1, DSAC1 did not provide specifics regarding Complainant not getting along with external agencies. Complainant explained that after receiving this information from DSAC1, AASAC1 sent an email to other Agency managers, including DSAC2, stating "...some inside baseball [Complainant] might need to be changed prior to arrival due to some new info that he may not play well with the other children."

Complainant alleged that AASAC1 did not examine, review, or otherwise consider Complainant's personnel file or prior performance appraisals when deciding to reassign Complainant. According to Complainant, his prior performance appraisals from 2013 and 2014, which were in possession of management in the Los Angeles Office, rated Complainant as having "Achieved Excellence" in representing the Agency to external partners and specifically lauded his performance in developing and maintaining excellent working relationship with state and local law enforcement agencies. Complainant asserted that his personnel file was devoid of any adverse personnel or disciplinary documentation.

Complainant also alleged that ASAC1 did not consult any of Complainant's current or former direct supervisors when deciding to reassign Complainant. Complainant further alleged that the Gang, HIDTA, and BEST (or LA BEST) units were all understaffed and needed additional investigators during the relevant time. Complainant alleged that his reassignment constituted "Freeway Therapy" for the information received from DSAC1. According to Complainant, "Freeway Therapy" is an unofficial form of punishment used by management whereby disfavored employees are reassigned to duty locations far from their homes to make employment unpleasant and to encourage the employee to quit. Complainant explained that at the time of his reassignment, Complainant lived approximately 13 miles from the HIDTA unit; whereas he lived approximately 30 miles from the Gang unit.

Complainant asserted that while he did not believe his reassignment was due to his sex, he believed that his sexual orientation was a factor. Complainant asserted that he highly suspected that DSAC1 made management in Los Angeles aware of his sexual orientation. According to Complainant, even if DSAC1 did not tell AASAC1 of Complainant's sexual orientation, DSAC1's motivation for providing false information was his animus towards homosexuals. Specifically, Complainant alleged that DSAC1, who Complainant noted he had had only one direct communication with at a social function, provided AASAC1 with adverse and false information about Complainant's work history because of Complainant's sexual orientation.

In response to Complainant's allegations, AASAC1 asserted that Complainant's reassignment was in the Agency's best interest because the Gang unit was understaffed and needed skilled investigators. AASAC1 noted that there is no policy regarding reassignment of which he is aware other than the General Services Administration (GSA) regulation that requires federal employees to live within 50 miles of their duty station if driving a government owned vehicle. DSAC2 provided supporting testimony, stating that employees are assigned and reassigned based on the needs of the office and Agency.

Regarding Claim 2, Complainant explained that after management received a complaint from a female heterosexual Intelligence Research Specialist (IRS1) that Complainant had made unwelcome sexual comments to her, belittled and ridiculed her, and made her feel uncomfortable and intimidated on more than one occasion, the Agency reassigned Complainant from the Gang unit to the BEST unit. Specifically, Complainant alleged that AASAC1 contacted Complainant's supervisor, DSAC2, who concurred with AASAC1's proposal to transfer Complainant out of the Gangs unit away from IRS1.

Complainant alleged that the Agency believed that the proper way to handle a sexual harassment allegation from a female employee is to immediately remove the male employee from the female's work unit. Complainant however acknowledged that in handling IRS1's sexual harassment claim against Complainant, the Agency fully complied with the provisions of its Anti-Harassment Policy and took action within days of the complaint.

Complainant stated his belief that his sex was a factor in the Agency's decision to reassign him to BEST because management allegedly feared and immediately acted on complaints from women but did not fear or act on complaints from men, including Complainant.

AASAC1 asserted that he made the decision to immediately transfer Complainant to the BEST unit in order to stem additional incidents or claims of sexual harassment or a perception that management turns a blind eye to such behavior. AASAC1 noted that management has a duty to provide a hostile free work environment.

Regarding Claim 3, Complainant explained that in 2015, LA BEST was comprised of three squads; and that SBPA1, a supervisory employee of Customs and Border Protection's (CBP [another agency within the Department]) was his squad leader.

Complainant alleged that during his BEST assignment, SBPA1 physically assaulted and verbally berated Complainant while on duty and within an Agency-leased office space. Specifically, Complainant alleged that SBPA1 pointed his finger at Complainant, yelled at Complainant, kicked Complainant below his right knee, and stated to Complainant: “Hey, Dick, are you going to read your email?” “You’d better not be calling me;” and “No motherfucker, you need to understand who you report to and you need to learn your role around here.”

Complainant asserted that he did not tell management about the incident because Complainant was physically and verbally defending himself from SBPA1. According to Complainant, he informed DSAC2 about the incident on April 17, 2015, weeks after the incident had occurred. Complainant explained that after he alleged workplace violence by SBPA1 and requested that SBPA1 be transferred, Complainant was moved to a different squad within BEST. Complainant further alleged that the Agency did not transfer or otherwise discipline SBPA1 for his actions stemming from Complainant’s allegation of workplace violence and harassment. According to Complainant, the Agency also never told CBP1, the Joint Intake Center (JIC), the Office of Professional Responsibility (OPR), or the Office of the Inspector General (OIG) about Complainant’s allegations against SBPA1 as required.

Complainant stated that the Agency believed that it has no power to remedy instances of workplace violence or to mitigate workplace harassment within its own office space when the aggressor is not an Agency employee. Complainant contended that DSAC2’s failure to follow Agency policy on allegations of workplace violence is prima facie evidence of employment discrimination based on sex, because when a female employee previously lodged a complaint against Complainant, DSAC2 and AASAC1 acted swiftly pursuant to Agency policy. Complainant did not know whether his sexual orientation played a part in the alleged incident between him and SBPA1. Complainant stated his belief that no one has ever asked SBPA1 what motivated him to physically strike and berate Complainant.

DSAC2 indicated that Complainant did not immediately tell management about the alleged incident when it occurred. DSAC2 also explained that in response to Complainant’s allegations, since SBPA1 was not an Agency employee, Complainant was moved to a different squad with a different supervisor so there would be limited to no interaction with SBPA1.

Complainant’s second-line supervisor, a Special Agent in Charge (ASAC1) explained that once management was made aware of the incident involving SBPA1, they spoke with SBPA1 and informed him that such behavior would not be tolerated. DSAC1 further asserted that SBPA1 offered to apologize. According to ASAC1, he understood that the incident between Complainant and SBPA1 amounted to personality conflicts or a situation where employees may just not be getting along. ASAC1 however stated that the Agency offered Complainant the opportunity to move to another group, but Complainant indicated that he did not want to move. ASAC1 further asserted that Management also told Complainant that if he wanted to move to a different group at a later time to let them know, but Complainant never advised management that he wanted to move.

In response, Complainant stated that management only ordered SBPA1 to apologize after being informed of the alleged workplace violence and after SBPA1 admitted to it. Complainant also denied that SBPA1 offered to apologize, but Complainant admitted that he declined the prospect of an apology, stating that he feared an additional confrontation and did not want to have any interactions with SBPA1 whatsoever. Complainant alleged that the Agency believed that the proper way to handle a workplace violence allegation from a male employee is to order the aggressor-employee to apologize and to leave the aggressor in place.

Regarding Claim 4, Complainant explained that he met with DSAC2, Complainant's then third-line supervisor, who had summoned Complainant to his office alone. Complainant asserted that this action is contrary to normal Agency practice and protocol in which first-line supervisors accompany employees during meetings with senior level management. Complainant alleged that during the meeting, DSAC2 stated that he needed Complainant not as a "eunuch," and that Complainant was considered a "eunuch." Complainant alleged that DSAC2 also stated that between Complainant and DSAC2, DSAC2 would be watching Complainant very closely because Complainant was listed on DSAC2's probation. Complainant then noted a dictionary definition of the term "eunuch," explaining that "eunuch" is an uncommonly used epithet for a homosexual male. Complainant stated that during the meeting, he expressed a concern of potential retaliation from SBPA1's friends at LA BEST for having reported workplace violence. Complainant stated that he and DSAC2 then discussed possible units to which Complainant could transfer. Complainant alleged that DSAC2 stated that he would look into the matter with other managers and get back to Complainant.

Complainant reiterated his belief that his sex was a factor because when a female complains, her complaints are taken seriously and acted upon; however, when a man complains, nothing is done. Complainant also stated his belief that his sexual orientation was a factor in the alleged incident because DSAC2's reference to "eunuch" was an inference to Complainant's sexuality.

DSAC2 asserted that Complainant never once expressed that he was afraid to be in the environment he was in; that Complainant did not advise DSAC2 that Complainant feared he could not remain at LA BEST; and that DSAC2 did not ask Complainant if Complainant wanted to transfer to another group. DSAC2 also asserted that he did not place Complainant on probation or personal probation. DSAC2 denied using the word "eunuch" in the workplace or in reference to an employee/agent; and he denied knowing Complainant's sexual orientation.

Regarding Claim 5, Complainant alleged that since April 2015, management has not addressed his ongoing harassment concerns, indicating that this allegation was in reference to his harassment claims. Management did not provide a response.

Regarding Claim 6, Complainant alleged that an officer (O1) employed by the Los Angeles Sheriff's Department who is a friend of SBPA1, and Complainant's LA BEST colleague, ordered Complainant to stay away from O1 while removing Complainant's sport coat from O1's office. Complainant alleged that O1 also told Complainant to "get the fuck out," and "take your sport coat with you."

Complainant further alleged that O1 called Complainant a “pussy” and taunted Complainant by stating, “go report that to your fucking ASAC.” Complainant asserted that the verbal beratement occurred in front of several coworkers.

Complainant asserted that he reported the matter to management during a later, September 21, 2015, meeting. Complainant alleged that about two weeks after the incident involving O1, Complainant found a tampon in his jacket. Complainant stated that he first told management about the incident with the tampon (and O1) at the September meeting. Complainant alleged that management did not transfer O1 away from Complainant or otherwise discipline O1 in any way for O1’s actions stemming from Complainant’s allegation of workplace harassment.

Complainant stated his belief that his sex was a factor in the alleged incident because when a female complains, management would have addressed it, but when a man complains, management does not address the issue. According to Complainant, management has failed to address complaints pursuant to Agency policy and maintain a hostility free workplace. Complainant did not know if O1 was aware of his sexual orientation but asserted his belief that O1’s conduct could be based on that basis because the focus was on Complainant’s sport coat. Complainant alleged that no one ever asked O1 what motivated him.

ASAC1 indicated that Complainant did not immediately report this incident to Agency management. ASAC1 stated that in response to Complainant’s complaints, management offered to move Complainant to a different squad, talked to the individuals involved, and reminded them that certain behaviors cannot be tolerated.

Regarding Claim 7, Complainant alleged that he went into a meeting with Group Supervisor (GS1), ASAC1, and DSAC2. Complainant explained that it was his understanding, based on ASAC1’s allegedly “false presentment,” that the meeting would discuss an Australian cocaine smuggling investigation. Complainant stated that the meeting was however a ruse that management used as a tactic to intimidate, scare, and belittle Complainant. Specifically, Complainant alleged that instead of discussing the identified investigation, DSAC2 asked Complainant about an incident in which Complainant commented to an OPR Special Agent (S1) that DSAC2 was a “fucking asshole.”

Complainant asserted that DSAC2 actually made the comment to Complainant when ordering Complainant to explain why Complainant had such an opinion of DSAC2. Complainant added that Complainant and DSAC2 also discussed other events that occurred since Complainant came to Los Angeles, including the meeting in which DSAC2 called Complainant a “eunuch.” Complainant restated DSAC2’s responses to the allegations in Claim 4, adding that DSAC2 told Complainant that DSAC2 has never disliked anyone in all his years in government and on this job more than he disliked Complainant. Complainant also alleged that DSAC2 stated that they were going to have a problem. Complainant also stated that DSAC2 called Complainant a “fucking liar.” Complainant asserted that during the meeting, he stated that he felt he was being subjected to a hostile work environment.

Complainant stated his belief that sex was a factor in how management reacted to his complaints, claiming that if a woman had complained of “workplace violence” by being called a “pussy” and having feminine hygiene products placed in her clothing, management would have followed Agency policies precisely. Complainant also stated that he did not believe management would question the placement of a woman’s genitals (in reference to the term “eunuch”). Complainant also asserted his belief that his sexual orientation was a factor because of the words used. Complainant did not know with certainty (inasmuch as one can never know with certainty the inner workings of another’s mind) but suspected that the individuals involved were aware of his sexual orientation.

GS1 affirmed that Complainant informed DSAC2 and GS1 that he felt that he was being harassed. GS1 stated that after the meeting, he spoke to his managers, DSAC2 and ASAC1; and that he was told not to do anything. GS1 asserted that in response, DSAC2 directed GS1’s manager to contact Agency attorneys to determine how best to proceed with Complainant’s allegations of a hostile work environment.

DSAC2, affirmed by ASAC1, stated that Complainant never specifically stated that Complainant felt like he was being harassed or that he was being subjected to a hostile work environment. DSAC2 asserted that Complainant told DSAC2 that the alleged comment was Complainant’s personal belief and he had every right to it.

In defense of the Agency’s reaction to Complainant’s allegations, ASAC1 stated that as soon as management was made aware of the incidents, they addressed them. ASAC1 reiterated that he also offered Complainant an opportunity to move to another group where he might thrive professionally and do something different. ASAC1 stated that management has done everything to address Complainant’s issues once Complainant made management aware of them.

In response, Complainant asserted that management never contacted Agency attorneys to discuss the matter. Complainant also generally asserted that management provided false testimony regarding his allegations.

In his summary judgment decision, the AJ concluded that Complainant failed to establish a prima facie case of discrimination through evidence of disparate treatment of similarly situated comparators; and that Complainant failed to proffer any other circumstantial evidence that is sufficient to support an assertion that management harbored an illegal bias against male and/or homosexual employees. The AJ explained that while not determinative, it bears noting that the alleged discriminating management officials were male, and, thus, members of Complainant’s protected category (male), which weakens Complainant’s claim of sex-based bias. The AJ further stated that Complainant’s mere opinion that he had been discriminated against and/or that the management officials harbored animus against him is insufficient to establish bias.

The AJ also concluded that Complainant’s hostile work environment claim must also fail because Complainant failed to establish a discriminatory motive by the Agency for any of the alleged incidents.

The AJ asserted that Complainant failed to meet his prima facie case to establish that the complained-of actions—individually and taken all together— were sufficiently severe or pervasive for a reasonable person to conclude that an actionable hostile or abusive work environment was created. The AJ also found that complainant was not subjected to any tangible employment action.

The AJ stated that even assuming the “pussy” comment by O1 and the “eunuch” comment by DSAC2 implicated sex and/or sexual orientation, these comments, without more, are not of sufficient severity or pervasiveness to state a viable hostile work environment claim. The AJ added that regarding Claims 3 and 6, assuming that Complainant could establish a prima facie case, the Agency is not liable for the complained-of actions because the Agency took preventive action by providing anti-harassment training to all employees on an annual basis and promulgated an anti-harassment policy that prohibited harassment on protected statuses.

The AJ further stated that with respect to Claim 3, the record supports the Agency’s statements that Complainant did not bring the complained-of actions by SBPA1 (a non-Agency employee) to the Agency’s attention when they occurred. The AJ asserted that Complainant also failed to present sufficient evidence to establish that the Agency knew or should have known about SBP1’s allegedly discriminatory actions. Rather, the AJ noted, the evidence of record supports that, when Complainant informed management about the complained-of actions, the Agency took prompt action by moving Complainant to another squad to limit the interaction between SBPA1 and Complainant.

With respect to Incident 6, the AJ explained that Complainant waited until a September 2015 meeting to inform management regarding the allegedly discriminatory actions by O1. The AJ asserted that Complainant did not present any evidence that the Agency knew or should have known about the complained-of actions prior to that date. The AJ further stated that when Complainant notified management about the alleged discriminatory actions, the evidence supports that Complainant was offered the opportunity to move to a different squad; and that management spoke to the individuals involved, reminding them that certain behaviors could not be tolerated. The AJ noted that while Complainant may have preferred the Agency to take other actions, the Agency’s actions were effective inasmuch as Complainant did not complain of further discriminatory action by DSAC2, SBPA1, or O1.

The Agency’s final action implemented the AJ’s decision. The instant appeal followed.

CONTENTIONS ON APPEAL

In his Appeal Brief, Complainant expresses disagreement with the AJ’s conclusion that Complainant did not suffer any adverse employment action; and argues that even one act of harassment is enough, if egregious, to find in his favor. He asserts that SBPA1’s physical assault, DSAC2’s eunuch comment, and DSAC2’s alleged personal probation comment were sufficient to establish a prima facie case of hostile work environment.

In its Appeal Brief, among other things, the Agency asserts that without more, Complainant's mere disagreement with the AJ's decision is not a legitimate reason for overturning the decision. The Agency requests that the Commission affirm the AJ's decision and its final order adopting it.

It appears that Complainant has decided not to argue Claim 1 regarding his reassignment to the Long Beach office on October 31, 2014, on appeal. In that regard, we note that the Commission can exercise its discretion not to review that claim. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, § IV.A. (Aug. 5, 2015).

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 EEO MD-110, at Chap. 9, § VI.B. (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (explaining that the *de novo* standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDINGS

We must determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of 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 fact is "material" if it has the potential to affect the outcome of the case.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." Anderson, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an AJ could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrenner, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." Pedersen v. Dep't of Justice, EEOC Request No. 05940339 (Feb. 24, 1995).

After a careful review, we find that the record in this case is not adequately developed. For example, the record includes exhibits G1A, G1B, and G2 which, in pertinent part, indicate that SBPA1, and the only witness to SBPA1's alleged physical assault against Complainant, did not provide affidavits. The record includes email exchanges between the Investigator and management indicating that SBPA1 refused to provide requested affidavits. Management also stated that he could not be compelled to provide an affidavit because he was not an Agency employee. As such, the AJ's summary judgment decision was made without relevant witness affidavits or testimony. Therefore, summary judgment is inappropriate.³

We also find that the AJ erred when she concluded that there was no genuine issue of material fact in this case.

³ Agencies and Complainants each have a duty to cooperate with the investigator during the investigation. See 29 C.F.R. § 1614.108(b). Pursuant to 29 C.F.R. § 1614.108(b), a party to a complaint - the complainant as well as the agency - may be subject to sanctions where it fails without good cause shown to respond fully and in a timely fashion to a request of the investigator for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses. Such is the situation in the instant complaint. At the very least, the AJ could have drawn an adverse inference that the requested information, or the testimony of SBPA1, the requested witness, would have reflected unfavorably on SBPA1 and the Agency. See EEO MD-110, Chap. 12, § VI, (Aug. 5, 2015)

In fact, there are issues of material fact in dispute regarding management's explanations for the alleged actions. The AJ's decision also improperly credited management's version of the events over Complainant's version. We have vacated AJ decisions where genuine issues of material fact in dispute exist; and where the AJ improperly credited management's affidavit testimony over Complainant's affidavit testimony. See Calvin D. v. U.S. Postal Serv., EEOC Appeal No. 0120140022 (Feb. 2, 2017); Ralph E. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120150169 (Jun. 6, 2017).

We also note that there is conflicting and inconsistent evidence regarding the alleged incidents in the instant case. Missing from the record are witness statements regarding whether the events alleged by Complainant had occurred including: the physical assault involving SBPA1 kicking Complainant alleged in Claim 3; DSAC2's eunuch comment and personal probation comment as asserted in Claim 4; and the "pussy" comment by O1 as raised in Claim 6. Furthermore, we find that the record evidence does not establish whether the individuals identified by Complainant knew of Complainant's sexual orientation.

We also find that the AJ incorrectly found that given all the evidence, Complainant did not suffer an adverse action. If a hearing were held and it was shown these actions did occur and were attributed to Complainant's sexual orientation, then, contrary to the AJ's determination, we find that these events could establish a viable claim of harassment. Furthermore, the evidence of record supports that, when Complainant informed management about the complained-of actions, the Agency failed to take prompt action because moving Complainant to another squad, instead of SBPA1, the alleged harasser, was inappropriate punitive action against Complainant, the victim. That action could also be retaliation for Complainant's harassment complaint to management. In harassment cases, we have stated that an agency may not involuntarily transfer or reassign the victim of the harassment, and the agency should instead transfer or reassign the harasser. See e.g. Darcy F. v. U.S. Postal Serv., EEOC Appeal No. 0120162782 (Sept. 19, 2018); Chi E. v. U.S. Postal Serv., EEOC Appeal No. 0120170068 (Nov. 29, 2018); Yael S. v. U.S. Postal Serv., EEOC Appeal No. 0120143125 (Oct. 22, 2015); Jones v. U.S. Postal Serv., EEOC Appeal No. 0120101754 (Aug. 12, 2010); see also Sally M. v. U.S. Postal Serv., EEOC DOC 0120172430 (Oct. 16, 2018) (finding that reassigning Complainant when she raised harassment complaint constituted unlawful retaliation).

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 at Chap. 7, §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 the various management officials, co-workers, and Complainant, himself. Therefore, judgment as a matter of law for the Agency should not have been granted as to Complainant's harassment and retaliation allegations.

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 REVERSES 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 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

August 9, 2021
Date