



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]

Foster B.,¹
Complainant,

v.

Xavier Becerra,
Secretary,
Department of Health and Human Services
(Indian Health Service),
Agency.

Appeal No. 2019005682

Agency No. HHS-IHS-0298-2018

DECISION

On July 22, 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 April 19, 2019, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the Agency properly determined that it did not subject Complainant to discrimination on the bases of sex (male, sexual orientation) and disability (mental and physical).

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 Supervisory Health System Specialist, GS-0671-12 at the Agency's Lower Brule Service Unit, Great Plains Area Office, Indian Health Service facility in Lower Brule, South Dakota.

In his formal complaint, Complainant stated that on four separate occasions his first-level supervisor, the Chief Executive Officer (the CEO), informed him that a Purchased Referred Care Specialist (E1), Complainant's subordinate, publicly disparaged Complainant for being gay. According to Complainant, he asked the CEO to send him an incident report so that he could take action against E1 but never received anything from the CEO.

Complainant stated that he felt targeted and harassed by E1 since beginning his employment in August 2016. As an example, Complainant stated that on December 11, 2017, E1 followed him to his office and threatened him by saying, "I have the ear of the Area Director and I am going to report your faggot ass and everyone in this clinic for everything that is going on in this clinic."

Complainant alleged that on December 13, 2017, while meeting with E1 in his office, she became very belligerent and said to him, "You're nothing but a fucking idiot, just cute; go ahead and report me, no one is going to believe you."

Complainant stated that on January 25, 2018, he received an instant message from the Business Officer Manager, advising him that she had overheard E1 on her cell phone telling someone, "If they want to pay me for fighting with a fag all day, then I guess that is what I will do." Complainant stated that the Business Office Manager indicated that she had been shocked that E1 would make such a statement in front of three federal employees and that E1 consistently made derogatory, insulting remarks about Complainant's sexual orientation.

Complainant reported that sometime in June or July 2018, an employee told him that, during a conversation with E1, E1 had stated, "I hate [Complainant], that fucking faggot!"

On June 27, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (male, sexual orientation) and disability (physical and mental) when, since January 16, 2018, and continuing, the CEO and the Deputy Director, Field Operations subjected Complainant to a hostile work environment when they permitted and/or failed to address such things as:

- a) Since August 2016, and continuing, E1 subjected Complainant to verbal beratement, insults, defamation, embarrassment, ridicule, name calling (specifically calling Complainant a "fag"), bullying and intimidation without repercussions, which for Complainant, resulted in diminished respect and ability to perform his job duties in a harassment free environment; and
- b) Since August 2016, and continuing, Complainant has had to endure an intolerable work environment despite his numerous complaints regarding E1's verbal attacks and

unprofessional behavior towards him because management failed to appropriately address his concerns.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

In the final Agency decision (FAD), the Agency determined that E1 engaged in the incidents that occurred between August 2016 and January 2018 because witness statements corroborated Complainant's testimony. The Agency found that while E1 subjected Complainant to the conduct based on his sexual orientation, E1 did not act based on Complainant's disability. As for the severity of the conduct, the Agency determined that none of the incidents were physically threatening or humiliating and they did not alter the terms of conditions of Complainant's employment. Moreover, the Agency noted that only two of the incidents involved E1 engaging directly with Complainant. The Agency went on to explain that because there were nine incidents in a 21-month period, the incidents were not frequent enough to constitute an illegally harassing hostile work environment. As such, the Agency concluded that the incidents, taken as a whole, did not rise to the level of severe or pervasive so as to alter the conditions of Complainant's employment and did not support a claim of actionable hostile work environment harassment.

The Agency went on to find that there was no sufficient basis to hold management liable for E1's conduct. Specifically, the Agency found that the management responses to Complainant's complaints of perceived harassment were inadequate, but Complainant failed to take advantage of a key corrective opportunity provided by the Agency because Complainant was E1's supervisor and he chose not to discipline E1.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Agency failed to ensure that employees were appropriately trained and that the Agency failed to provide harassment training. Complainant avers that he submitted disciplinary action on E1 multiple times only for it to be returned. The Agency did not provide a response to Complainant's appeal.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal

determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

ANALYSIS AND FINDINGS

Hostile Work Environment

To establish a claim of harassment a complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on his statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant’s] employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Therefore, to prove his harassment claim, Complainant must establish that he was subjected to conduct that was either so severe or so pervasive that a “reasonable person” in Complainant’s position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of his protected classes. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself.

Here, the Agency’s FAD does not challenge the fact that the incidents occurred as alleged. Moreover, there is abundant evidence in the record that E1 subjected Complainant to unwelcome harassment consisting of comments based on Complainant’s sexual orientation² between August 2016 and July 2018, in and out of Complainant’s presence, to Complainant’s subordinates and superiors. For example, multiple witnesses reported that E1 routinely referred to Complainant as a “faggot.” ROI at 74, 86, 100-101, 114, 134, 140. In fact, E1’s comments were often made or relayed to management officials, who rather than acting to discontinue the behavior, encouraged Complainant to file an EEO complaint.

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

The Commission has previously observed that the words “fag” and “faggot” have been historically used in the United States as highly offensive, insulting, and degrading sex-based epithets against gay men. See Couch v. Dep't of Energy, EEOC Appeal No. 0120131136 (Aug. 13, 2013). Additionally, the words “fag” and “faggot” are offensive, insulting, and degrading sex-based epithets historically used when a person is displaying the belief that a male is not as masculine or as manly as the person is. See, e.g., Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 870, 875 (9th Cir. 2001) (concluding that verbal abuse, including the use of the epithet “faggot,” occurred because of sex). We find that Complainant has established that he was subjected to a hostile work environment based on sex and sexual orientation.

Therefore, we must determine if there is a basis for imputing liability on the Agency. In the case of co-worker harassment, an agency is responsible for acts of harassment in the workplace where the agency (or its agents) knew or should have known of the conduct, unless it can be shown that it took immediate and appropriate corrective action. See Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999). An agency can raise an affirmative defense when it shows that it took immediate and appropriate corrective action. Id. What is appropriate remedial action will necessarily depend on the particular facts of the case, such as the severity and persistence of the harassment and the effectiveness of any initial remedial steps. Taylor v. Dep't Of Air Force, EEOC Request No. 05920194 (July 8, 1992).

Here, we find that the Agency knew of the conduct at issue. We further find that management officials did not take prompt and effective action once they became aware of E1's conduct, as they placed the onus on Complainant to discipline E1 or file an EEO complaint. The Deputy Director denied knowledge of the incidents. However, the record indicates that Complainant reported his concerns to the Deputy Director verbally and in writing. ROI at 77. Additionally, the record is clear that the Agency had constructive knowledge of the harassment that Complainant endured, as E1 referred to Complainant by the offensive terms openly to others in the office. Taylor v. Dep't of the Air Force, EEOC Request No. 05920194 (July 9, 1992) (employers will generally be deemed to have constructive knowledge of harassment that is openly practiced in the workplace or is well-known among employees). The record further shows that leadership had knowledge of the conduct because the CEO was within Complainant's chain of command and the CEO affirmed that she made Complainant aware of E1's comments. Id. at 86. The CEO stated that she admonished E1 for the comments when she made them in her presence and encouraged Complainant to file an EEO complaint, but stated that she did not feel that it would be appropriate to interject herself without Complainant's request because Complainant was E1's first-line supervisor, and took no further action. Id. We remind the Agency that the EEO process is not a substitute for the Agency's internal process. Moreover, we find that the inadequate responses from Complainant's chain of command likely emboldened E1 to continue harassing Complainant, diminished his authority as her supervisor, and heightened the severity of the alleged incidents. Debbra R. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120161305 (Jul6 26, 2016) (finding that when harassment is repeated, a supervisor's failure to respond to instances of alleged harassment heightens the severity of the alleged act). As such, we find that E1's actions unreasonably interfered with Complainant's work environment and management officials failed to take prompt and effective action.

Regarding Complainant's claim that he was also subjected to disability discrimination, we decline to address this issue because no additional relief would be available to Complainant if he were to prevail on this basis.

Anti-Harassment Policy

Finally, we address Complainant's contentions regarding deficiencies in the Agency's anti-harassment policy. While Complainant asserts, and the record establishes, that E1, Deputy Director, the CEO, and Complainant did not have harassment prevention training on file, the record further reveals that the Agency did not effectively communicate EEO policies and procedures in accordance with the Commission's Management Directive (MD-715).³ ROI, at 171, 174. In Rosemaria F. v. Dep't of the Navy, we reiterated that an agency's anti-harassment policy must contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct, including a reference to all of the protected bases;
- Assurance that employees who make claims of harassment or provide information related to such claims will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues for complaints;
- Assurance that to the extent possible, the employer will protect the confidentiality of the individuals bringing harassment claims;
- A complaint proves that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

Rosemaria F., EEOC Appeal No. 0120181068 (Feb. 14, 2020); request for recon. den. EEOC Request No. 2020003073 (Nov. 9, 2020), (finding that the Agency's anti-harassment policy did not comply with the Commission's MD-715 policy guidance because it did not clearly establish the complaint procedure, including the appropriate channels for filing a complaint, and ensure confidentiality to the extent possible when the agency's policy failed to mention where an

³ The Commission's MD-715 is the policy guidance which the Commission provides to federal agencies for their use in establishing and maintaining effective programs of equal employment opportunity under Title VII and the Rehabilitation Act. MD-715 provides a roadmap for ensuring that all employees and applicants for employment enjoy equality of opportunity in the federal workplace regardless of race, sex, national origin, color, religion, disability, or reprisal for engaging in prior protected EEO activity. Compliance with MD-715 is mandatory for all Executive agencies. See MD-715 ("Responsibilities") ("Agency Heads are responsible for the following: 1. Ensuring compliance with this Directive and those implementing instructions issued by EEOC in accordance with existing law and authority."). See also 29 C.F.R. § 1614.103(b)(2) ("This part applies to... Executive agencies as defined in 5 U.S.C. 105..."); and 29 C.F.R. § 1614.102(e) ("Agency [EEO] programs *shall* comply with this part and the Management Directives and Bulletins that the Commission issues.") (emphasis added).

employee must go to file a complaint, who will conduct the investigation, and who will make the decision for corrective action and failed to mention a right to confidentiality).

Following a review of the Workplace Anti-Harassment Policy Statement that the Agency issued on May 29, 2012, outlining its obligation to prevent harassment, we conclude that this policy fails to effectively communicate EEO policies and procedures in accordance with MD-715 because it does not: 1) clearly establish the complaint procedure, including the appropriate channels for filing a complaint, that is separate from the EEO process; and 2) ensure confidentiality to the extent possible. As in Rosemaria F., the Agency's policy statement policy does not set out with specificity the complaint procedures by which an employee may raise a claim of harassment, including time frames for the processing of the harassment allegations, as well as naming officials who can receive such claims. Similarly, the Agency's policy does not provide notice of the requisite confidentiality accorded to the filing of claims of harassment.

As the Agency is not in compliance with MD-715 regarding its anti-harassment policy, under circumstances that are capable of being repeated, we order the Agency to seek technical assistance from the Commission's Office of Federal Operations, Federal Sector Programs, and to correct the deficiencies in the policy identified above. This will ensure that the agency is taking the necessary preventive steps to avoid liability for harassment in the future.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final decision. The Commission REMANDS this matter to the Agency to undertake further actions consistent with this decision and the ORDER set forth below.

ORDER

The Agency shall comply with the orders below within 120 calendar days unless otherwise specified.

1. The Agency will conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford him an opportunity to establish a causal relationship between the harassment he endured and any pecuniary or non-pecuniary losses. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages. 29 C.F.R. § 1614.110. The supplemental investigation and issuance of final decision will be completed within sixty (60) calendar days of the date this decision becomes final. A copy of the final decision must be submitted to the Compliance Officer, as referenced below.
2. Within thirty (30) calendar days from the date this decision is issued, the appropriate Agency EEO component shall request technical assistance from the EEOC, Office of Federal Operations, Federal Sector Programs (FSP), on revising its antiharassment policy to conform to the standards set forth in MD-715.

Within sixty (60) calendar days from the date this decision is issued, the Agency shall revise its anti-harassment policy to FSP's satisfaction and the Agency shall promptly reissue a new anti-harassment policy statement signed by the agency head. To fulfill its legal obligation to effectively communicate EEO policies and procedures to all employees, the Agency shall disseminate its revised anti-harassment policy statement within thirty (30) calendar days of issuing the revised policy statement. Methods of dissemination include training, webinars, brochures, emails, or other types of written communication. Instructions to Federal Agencies for MD-715 Section I The Model EEO Program, Part I. Element A (B).

3. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive EEO training to the management officials involved in this matter, particularly addressing the parties' responsibilities with respect to eliminating harassment in the workplace.
4. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against E1 and the management officials responsible for the established harassment. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the agency shall furnish documentation of their departure date(s).
5. Within sixty (60) calendar days of the date this decision is issued, the Agency shall post a notice in accordance with the statement entitled "Posting Order."

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation verifying that corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Lower Brule Service Unit 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).

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

April 12, 2021
Date