



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Markus C.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2020000154

Agency No. BOP-2018-0182

DECISION

On October 7, 2019, Complainant, via his attorney, filed an appeal, per 29 C.F.R. § 1614.403(a), from a September 11, 2019 final Agency decision (FAD) 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Correctional Institution Administrator (Associate Warden), GS-0006-14, at the Federal Correctional Institution (FCI), Warden's Office, in Greenville, Illinois.

On December 8, 2017, Complainant filed an EEO complaint alleging the Agency discriminated against him based on reprisal for prior EEO activity under Title VII and the ADEA when:

1. From approximately November 2016 – October 2017, he was harassed by being referred five times to the Bureau of Prisons Office of Internal Affairs (OIA) – once for failure to follow policy, once for failure to report a violation of rules/regulations, once for failure to

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.

follow policy and conduct unbecoming of a supervisor, and two times for conduct unbecoming of a management official.²

2. On October 27, 2017, he was transferred, effective January 21, 2018, to the U.S. Penitentiary in Marion, Illinois.

After an EEO investigation, the Agency gave Complainant a copy of the report and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant did not request a hearing.

In its FAD, the Agency first found Complainant failed to timely initiate EEO counseling. In the alternative, on issue 1, the Agency determined Complainant did not prove he was subjected to reprisal. Specifically, the Warden, Complainant's first line supervisor, said he referred him to OIA because he believed he engaged in misconduct. One of the five OIA investigations concluded Complainant violated Agency policy. In addition to Complainant, other employees were also accused in four of the OIA referrals. On issue 2, according to Agency management witnesses, Complainant, along with two other FCI Greenville Executive staff, were transferred around the same time out of Greenville because of a fractured relationship among the FCI Executive Staff. In sum, the Agency concluded Complainant did not prove any of the actions were motivated by unlawful retaliatory animus.

The instant appeal from Complainant followed.

ANALYSIS AND FINDINGS

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 (review the record with fresh eyes) by the Commission. 29 C.F.R. § 1614.405(a).

Timeliness of EEO Counseling for Issue 1

We note initially that the FAD incorrectly describes the holding of National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 117 (2002). A hostile work environment claim is comprised of a series of separate acts that collectively constitute one unlawful employment practice. National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 117 (2002). Unlike a claim which is based on discrete acts of discrimination, a hostile work environment claim is based upon the cumulative effect of individual acts that may not themselves be actionable. *Id.* at 115. A hostile work environment claim will not be time barred if all acts constituting the claim are part of the same unlawful practice even if some component acts of hostile work environment fall

² In its FAD, the Agency termed this issue as occurring from approximately "2016 to the time of filing." When it originally accepted, this issue it termed it as "a pattern of being referred", with no mention "to the time of filing." The issue as accepted better captures the complaint. We also added more specificity to this issue.

outside the statutory time period so long as an act contributing to the claim falls within the filing period. Id. at 117.

Where there is an issue of timeliness, "[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness." Guy v. Dep't of Energy, EEOC Request No. 05930703 (Jan. 4, 1994) (quoting Williams v. Dep't of Def., EEOC Request No. 05920506 (Aug. 25, 1992)). In addition, in Ericson v. Dep't of the Army, EEOC Request No. 05920623 (Jan. 14, 1993), the Commission stated that "the agency has the burden of providing evidence and/or proof to support its final decisions." See also Gens v. Dep't of Def., EEOC Request No. 05910837 (Jan. 31, 1992).

Applying the above, we find issue 1 timely. Complainant initiated EEO counseling on November 14, 2017. All the alleged actions involved the same person, the Warden, with like justifications for the referrals. At least one incident of harassment occurred within 45 days prior to Complainant initiating EEO counseling on November 14, 2017. Even if a referral did not occur within 45 days of Complainant initiating EEO counseling on November 14, 2017, the Agency has not met its burden of proving when Complainant likely became aware of the referrals and OIA investigations. Therefore, we are unpersuaded by the Agency's claim of untimely EEO counseling contact and will proceed with adjudicating this matter on its merits.

Ongoing Harassment – Referrals to OIA

By way of background, the record shows that in January 2016, and again in late April or early May 2016, Complainant voiced his concerns to the Warden about what he perceived as discrimination towards certain Black staff members. Complainant believed that the Warden was angry over these discussions and began harassing him in retaliation.

Complainant initiated EEO counseling on November 2, 2016, alleging retaliation. In December 2016, Complainant filed an EEO complaint ("Complaint 1" – not the current EEO complaint) alleging that the Warden unlawfully retaliated against him for opposing discrimination by: (a) harassing him, and (b) on May 1, 2017, transferring the supervision of the Safety and Facilities department from him to the other Greenville Associate Warden.³ Complaint 1 was eventually the subject of an appeal to the EEOC. In EEOC Appeal No. 2019004183 (May 20, 2021), the Commission concluded the Warden's decision to remove the Safety and Facilities department from Complainant's supervision was retaliatory in violation of Title VII. The Commission recounted that the Warden stated he transferred supervision of the department because Complainant's subordinate ("Facilities Manager"), who managed Safety and Facilities, told him Complainant attempted to undermine his authority and credibility with his staff. However, the Facilities Manager denied he complained to the Warden and affirmatively stated he did not request the change and had no knowledge why Complainant's responsibility over his department changed.

³ After an EEO investigator was appointed for Complaint 1, in August 2017, an EEO Officer notified the Warden of the complaint. On October 30, 2017, the Warden completed a detailed EEO investigative affidavit denying unlawful retaliation.

The Commission found it implausible that the Facilities Manager would be as upset with Complainant undermining his authority as the Warden claimed yet deny under oath that he knew nothing about it. The appellate decision also found that the Warden's description of events was not supported by other evidence. Finally, we noted that a facility Captain and an Operations Manager both averred that, in their opinions, the Warden was retaliating against Complainant. The appellate decision therefore found that Complainant had established unlawful reprisal when his supervisory duties over the Safety and Facilities departments were removed. The matter was remanded to the Agency to determine an amount of compensatory damages, and provide EEO training to the Warden, as well as consider taking disciplinary action for his retaliatory conduct.

In the current complaint, Complainant alleges that in retaliation for Complaint 1 and his other prior EEO activity, the Warden began the series of referrals to OIA. It appears Complainant was referred to OIA four or five times by the Warden over an 18-month period.⁴ Complainant said he soon became aware that the Warden was "soliciting" negative information about Complainant from other staff members. The Warden, on the other hand, justified the referrals by relating that after receiving allegations from staff about Complainant, he determined it was necessary to make referrals to OIA for conduct unbecoming a supervisor or manager. It appears that none of the referrals resulted in disciplinary action against Complainant.

For the Warden's first referral for conduct unbecoming, OIA after interviewing seven witnesses did not find one witness who corroborated the charge that Complainant consumed alcohol at a staff appreciation party. The Warden's second referral on its face did not seem to meet the serious charge of conduct unbecoming - Complainant remarking to a third party that a specific person gave a negative reference on someone who was being considered for promotion. The OIA investigative report did not indicate a bad reference was even given, let alone sustain the charge Complainant made the remark. The investigation of a third referral revealed that the person who Complainant allegedly made the comment to about digging up "dirt" on another staff member did not know what kind of dirt, did not remember the names of any of the other staff allegedly standing around when this occurred, and there was no video footage to identify possible witnesses.⁵

⁴ The first referral occurred at the same time Complainant sought EEO counseling for Complaint 1, and later referrals occurred during the investigation of Complaint 1.

⁵ Around September 7, 2017, Complainant was referred to OIA for Failure to Follow Policy. This concerned him not submitting memorandums from October 2016 – October 2017 to the Food Service Administrator on the date and number attendees before meals were provided free of charge for Community Relations Board meetings. The OIA report found that while Complainant did not know this was required, it was the responsibility of the Associate Warden of Operations to prepare a memorandum in advance of each Community Relations Board meeting for accountability of the cost of meals and he did not, so the charge was sustained. In the same investigative report, OIA sustained the same charge against another person who acted as Associate Warden of Operations for the identical reason. We note the Warden stated he referred Complainant to OIA three times, all for Conduct Unbecoming of a Supervisor, and this sustained charge, the only one, was for Failure to Follow Policy.

We now conclude that Complainant has established a clear nexus between the Warden's series of referrals to OIA and his protected EEO activity. See Whitmire v. Department of the Air Force, EEOC Appeal No. 01A00340 (September 25, 2000). Among other things, the first referral to OIA occurred at the same time Complainant sought EEO counseling for Complaint 1, and later referrals occurred during the investigation of Complaint 1. Moreover, in May 2017 (prior to most of the referrals), the Warden transferred the supervision of the Safety and Facilities departments from Complainant to another Associate Warden, an act this Commission has already found to have been motivated by illegal retaliatory animus.⁶

The FCI Greenville General Foreman, who previously acted as the Facilities and the Safety Manager, averred that the Warden had a history of threatening, bullying, and/or coercing Department Heads to make allegations of misconduct against Complainant, and even solicited staff to prepare and submit memorandums.

The Special Investigations Services Supervisor ("the Lieutenant") said that his office handled staff referrals to OIA. The Lieutenant confirmed that Complainant was referred for internal investigations five times in eighteen months. The Lieutenant stated that, based on his conversations with the Warden, it appeared the Warden made referrals against Complainant because of a "negative bias" towards him. The Lieutenant said that no charges were ever sustained against Complainant. The Lieutenant opined that the referrals were intended to punish Complainant, but he did not know if complainant's EEO activity was the reason for the referrals.

A Captain confirmed that none of the referrals he was aware of resulted in disciplinary action against Complainant and said that it was his belief that the Warden was referring Complainant to OIA for very "very minor infractions but [the Warden] has not referred staff he likes for major infractions." The Captain stated that the Warden "was clearly wanting [Complainant] transferred from [the facility]."

Review of the OIA reports does not indicate that any of the cases against Complainant were a close call. Based on the evidence of record, we find it more likely than not that the Warden repeatedly referred Complainant for conduct unbecoming a supervisor/manager to OIA in retaliation for his EEO activity.

Once retaliatory harassment is found, we must determine whether the Agency should be held liable for its existence. An employer is subject to vicarious liability for unlawful harassment if the harassment was "created by a supervisor with immediate (or successively higher) authority over the employee." Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, OLC Control Number EEOC-CVG-1999-2 (Jun. 18, 1999) (available at eeoc.gov).

⁶ We also note that on April 20, 2017, the Warden gave Complainant an annual appraisal with an overall rating of "Achieved Results", which the Agency in the internal grievance process later determined should have been Outstanding, the highest possible out of five levels - two levels up from "Achieved Results". This casts doubt on the Warden's objectivity when it came to Complainant. The change in the appraisal was not the result of a settlement.

An employer is always liable for harassment by a supervisor on a prohibited basis that culminates in a tangible employment action. No affirmative defense is available in such cases. Id. However, where the harassment by a supervisor creates an unlawful hostile environment but does not result in a tangible employment action, the employer can raise an affirmative defense to liability, which it must prove by a preponderance of the evidence. The defense consists of two elements: (a) the employer exercised reasonable care to prevent and correct promptly any harassment; and (b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

While we find that the Warden referring Complainant to OIA may not have been a tangible employment action, we need not analyze issue 1 further because the Agency did not raise an affirmative defense. The Agency's finding of no unlawful retaliation on issue 1 is REVERSED.

Issue 2 – Transferred to the U.S. Penitentiary Marion Illinois

To prevail on this claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). He must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Complainant stated that, in late October 2017, the Warden called to inform him that he was being transferred to the penitentiary in Marion, Illinois, about two hours away from the Greenville facility. However, the Warden stated during the investigation that he played no role in the decision to transfer Complainant to Marion.

The Regional Director for the North Central Region said she recommended Complainant's transfer to the Director of the Bureau of Prisons "because of the fractured relationship among the Executive Staff and the impact it was having on the staff in which they serve." The Regional Director noted that Complainant had served at FCI for 60 months, and "leadership change is often beneficial ... ". The Regional Director noted that supervisory staff are required to be "mobile" and all staff agree to be transferred as necessary for the good of the agency when they accept positions such as Assistant Warden.

Complainant conceded that, during an institutional review held in early October 2017, the Regional Director had told him that "because of the issues at [Greenville], there were some tough decisions to make, there was going to be some people moving, and everyone would not be happy." According to Complainant, the Regional Director said that "there would be moves" at the supervisor and line levels.

However, Complainant stated that he knew of no other employee being forced to relocate. The record evidence shows differently. The other Associate Warden and the Camp Administrator/Executive Assistant, who Complainant alleged were aligned with the Warden against Complainant, were also transferred out of FCI Greenville around the same time. The record suggests the Regional Director was also the force behind their transfers.

In sum, while the Regional Director admitted to being aware of Complainant's prior EEO activity, she articulated legitimate, non-retaliatory reasons for the transfer of Complainant along with other similarly situated management personnel. Complainant has not proven, by a preponderance of the evidence, that the proffered reason (the dis-functional relationships in management at Greenville which was negatively impacting the facility) for his transfer, as well as the transfer of other management personnel, was a pretext designed to mask illegal retaliatory animus. As such, we AFFIRM the Agency's FAD on this issue.

CONCLUSION

The FAD is REVERSED on issue 1 and AFFIRMED on issue 2. The matter to REMANDED to the Agency for compliance with the following Order.

ORDER

1. The Agency will immediately take steps to ensure that all harassment by the Warden referenced in this decision ceases and ensure that it takes steps to immediately address any reports of harassment or discrimination brought to its attention.
2. The Agency shall undertake a supplemental investigation to determine Complainant's entitlement to compensatory damages under Title VII. Within 10 calendar days of the date of this decision, the Agency shall provide Complainant a point of contact to submit evidence of compensatory damages, give him guidance on what to provide consistent with EEOC's Enforcement Guidance: Compensatory and Punitive Damages Available under Sec 102 of the CRA of 1991, OLC Control No. EEOC-CVG-1992-3 (Jul. 14, 1992), and advise him he has 80 days to submit the evidence to the Agency point of contact. The Agency shall issue a FAD addressing compensatory damages within 60 calendar days of the date it receives Complainant's damages submission, with appeal rights to this office. The Agency shall submit a copy of the FAD to the Compliance Officer at the address set forth below.
3. Within 120 days of the date on which this decision is issued, the Agency shall provide Workplace Civility and Bystander Intervention training in a manner the Agency's EEO function deems appropriate to all FCI Greenville Executive Staff and Department Heads.
4. The Agency shall consider taking disciplinary action against the Warden referenced in this decision. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. The Commission does not consider training to constitute disciplinary action.

POSTING ORDER (G0617)

The Agency is ordered to post at Greenville FCI, 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).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999).

If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

August 19, 2021

Date