



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

[REDACTED]
Tomeka T.,¹
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury,
Agency.

Appeal No. 2020000390

Hearing No. 570-2017-00264X

Agency No. IRSCC-16-0038-F

DECISION

On October 17, 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 September 5, 2019 final decision concerning an equal employment opportunity (EEO) complaint claiming 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

During the relevant time, Complainant worked as a Tax Law Specialist, GS-13, at the Agency's Tax-Exempt Government Entities in the IRS Office of Chief Counsel in Washington, D.C.

On July 27, 2015, Complainant initiated EEO Counselor contact. Informal efforts to resolve her concerns were not successful.

On January 15, 2016, Complainant filed a formal complaint. Therein, Complainant claimed that the Agency discriminated against her based on sex (female) and in reprisal for prior protected EEO activity when:

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

1. On June 23, 2015, a management official informed Complainant that her claims of discrimination were matters she brought upon herself and that he wanted to get her out of the building.
2. In July 2015, Complainant declined an offer from management to work on a group project because a member of the group previously physically assaulted her. Complainant further alleges that management cited her declination as a reason to isolate her from working on other projects and deny her other opportunities for career advancement.
3. On July 22, 2015 and October 28, 2015, management sent individuals whom Complainant believed were from the Agency's Office of the Inspector General to her office.
4. In March/April and November 2015, Complainant was not paid a monetary bonus.
5. In March 2015, a group of new attorneys was warned during their orientation, not to report management's retaliation and harassment up the chain of command and specifically advised not to report matters to the IRS Commissioner.
6. In January 2016, management threatened to deny Complainant permission to participate as a speaker on a panel at the American Bar Association Section on Taxation mid-year meeting, threatened to make her use annual leave to attend the meeting and denied her use of training hours for the meeting.
7. On June 8, 2016, Complainant was called into a meeting by an Agency official because of her status as an EEO complainant, threatened and repeatedly asked to tell him that she would not file any further charges or allege retaliation and warned that her work conditions would suffer if she continued to pursue her EEO case.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b), finding no discrimination or unlawful retaliation, as well as dismissing one independent claim for untimely EEO Counselor contact.

The instant appeal 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 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”).

Procedural Dismissal

Complainant alleges in Claim 4, that that in March/April 2015 and in November 2015, she was denied a bonus for work she *performed in 2014* under previous management. The record indicates, however, that Complainant did not bring her concerns to the attention of an EEO Counselor in a timely manner. According to EEOC Regulation 29 C.F.R. § 1614.107 (a)(1), complaints of discrimination should be brought to the attention of an EEO Counselor within forty-five (45) days of the alleged discriminatory matter. In this regard, the Agency properly determined that claim 4, as an independent claim of di was untimely raised with an EEO Counselor. We also will not consider this matter under Complainant’s broader harassment claim because it involved different management officials and there appears to be no link between this matter and the other later harassment being alleged in the complaint.

Harassment/Hostile Work Environment

To establish a claim of hostile work environment harassment Complainant must show that: (1) she belongs to a statutorily protected class; (2) she 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 her statutorily protected classes; (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).

In other words, to prove her harassment claim, Complainant must establish that she 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 a protected basis – in this case, her sex or prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

The evidence developed during the investigation into the complaint, reveals the following summary of facts at issue:

Concerning Claim 1, Complainant requested a meet with an identified management official (M1) regarding her desire to transfer to another division. Complainant acknowledges that she met with M1 regarding her wish to transfer. M1 denies making any comments about Complainant's allegations of discrimination or stating he wanted her out of the building. Other than her bare assertion regarding the matters raised in the conversation, Complainant provided no additional evidence or information to substantiate her claim of the content of this conversation.

In Claim 2, Complainant's supervisor (S1) indicates that he solicited Complainant's involvement in a work project in July 2015. Complainant responded that she was interested in working on the project. However, when an email was transmitted to set up a meeting for the group project, Complainant sent S1 an email indicating she was not comfortable working with one of the group members who had been involved in her prior EEO complaint against the Agency. S1 states that he solicited Complainant's involvement without being aware of any past relationship with a member of the group also working on the project. According to S1, once Complainant declined to participate in the project, she was immediately removed from the work group. Regarding Complainant's allegation that her declination led to isolation from working with others and being denied opportunities for career growth, Complainant's second line supervisor (S2) offered Complainant an opportunity to work on another group project in March 2016. Again, Complainant declined to participate. According to S2, he was disappointed that Complainant turned down the opportunity to participate as he believed the March 2016 project would provide Complainant a developmental opportunity to be the primary drafter of piece of published Agency guidance.

In Claim 3, Complainant alleges that Agency management sent individuals to her office she believed to be from the Office of the Inspector General. However, Complainant failed to provide any evidence or information to support her claim or to demonstrate how she was harmed by the Agency's alleged conduct.

Regarding Claim 5, Complainant failed to provide evidence or information other than her bare assertion that an identified management official (M2) advised a group of new attorneys during their orientation not to report instances of reprisal and harassment. M2 denied the allegation and no one else at the event corroborated Complainant's version of M2's remarks.

The record indicates, concerning Claim 6, that Complainant was invited to speak about LGBT discrimination in the workplace in a panel discussion in Los Angeles, California. According to management witnesses because the topic was not related to Complainant's work with the Agency, Complainant's attendance at the panel was considered outside activity requiring Complainant to use accrued leave to attend. The Agency advised Complainant that she could claim training hours for attendance at tax-related training sessions relevant to her job.

Upon review of claims 1 – 3, and 5 and 6, in the context of a harassment claim, we determine there is simply no evidence that the events at issue occurred as alleged by Complainant and/or that her sex or prior EEO activity played any role in the events at issue.

Claim 7: Interference with the EEO Process

An employee may suffer unlawful retaliation if her supervisor or management interferes with her EEO activity. See Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998); Complainant v. Dep't of Defense, EEOC Appeal No. 0120132212 (November 8, 2013). When management's behavior has a potentially chilling effect on the use of the EEO complaint process -- the ultimate tool that employees have to enforce equal employment opportunity -- the behavior can be a violation of Title VII's prohibition against retaliation. Moreover, the Commission has stated that adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006) (finding that the anti-retaliation provision protects individuals from a retaliatory that a reasonable person would have found "materially adverse," which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEO charge process); Complainant v. Department of Defense, EEOC Appeal No. 0120132212 (November 8, 2013) (reversing an Administrative Judge's finding that Complainant failed to establish that she was subjected to unlawful retaliation).

In Claim 7, the record indicates that at a meeting on June 16, 2016, S2 discussed Complainant's EEO case with other Agency officials including S1. Complainant was in attendance at the meeting. According to the record, S2 repeatedly referred to Complainant's EEO case in an angry voice. The record further indicates that S1 admitted to saying directly to Complainant that he did not commit the misconduct she alleged and that he was offended by the allegations.

Regarding claim 7, we concur with the Agency's own finding that S2's comments constituted a "per se" violation of Title VII's prohibition of reprisal discrimination at the June 8, 2016 meeting when he expressed his anger regarding Complainant's EEO claims. S2's comments and conduct were reasonably likely to deter Complainant, or any other employees who were present at the time, from personally engaging in the EEO process. After our own review of the record, we find that the Agency properly found that it had subjected Complainant to unlawful retaliation.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we AFFIRM the Agency's finding that Complainant failed to prove discrimination or unlawful retaliation regarding Claims 1 – 6.

Regarding Claim 7, we AFFIRM the Agency's finding of a violation of Title VII's prohibition against retaliation.

We modify the Agency's order of remedies, however, by directing the Agency to conduct a supplemental investigation on the issue of compensatory damages, contrary to the Agency's determination that such a remedy is not available in this case.

ORDER

The Agency is ORDERED to take the following remedial action regarding Claim 7:

1. Within sixty (60) calendar days of the date this decision is issued, the Agency shall provide no less than four (4) hours of training for S2. The training shall place special emphasis on the obligation not to restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings under the laws enforced by the Equal Employment Opportunity Commission.
2. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider appropriate disciplinary action against S2. 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. The Agency is advised that training is not considered disciplinary action. If S2 has left the Agency, the Agency shall provide the date of separation.
3. Within ninety (90) calendar days of the date this decision is issued, the Agency shall undertake a supplemental investigation concerning Complainant's entitlement to compensatory damages and determine the amount of compensatory damages due Complainant in a final decision with appeal rights to the Commission. Within thirty (30) days of the date of the determination of the amount of compensatory damages, the Agency shall pay this amount to Complainant. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to Complainant for the undisputed amount. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
4. The Agency is required to post a notice in accordance with the paragraph 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 of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Tax-Exempt Government Entities at the IRS Office of Chief Counsel 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 (T0610)

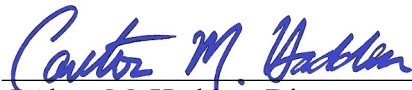
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint.

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

June 15, 2021

Date