



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Jane H.,<sup>1</sup>  
Complainant,

v.

John P. Roth,  
Acting Secretary,  
Department of the Air Force,  
Agency.

Appeal No. 2020003198

Hearing Nos. 480-2016-00105X  
480-2017-00652X

Agency Nos. 5Z1S15002  
5Z1S16003

**DECISION**

On April 12, 2020, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's final action concerning her 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 MODIFIES the Agency's final order, in part, and REMANDS the complaint for further processing.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Range Scheduler, GS-1101-11, at the Vandenberg Air Force Base, 2nd Range Operations Squadron in Santa Barbara County, California.

On January 22, 2015, Complainant filed a formal complaint alleging that the Agency subjected her to a hostile work environment on the bases of sex (female) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964. Following several amendments to the formal complaint, the Agency accepted the following claims for investigation:

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<sup>1</sup> 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. From January 5-12, 2015, Complainant was told to submit a leave request to meet with the EEO Counselor and other requests to conduct union business were denied;
2. On January 22, 2015, when a colleague (C1) sent an email to the office stating that Complainant was incorrect about an office procedure, and Complainant's supervisor followed with an office-wide email thanking him;
3. In July 2010, a colleague (C2) accessed and altered Complainant's work while Complainant was on leave and continued to do so until a supervisor told him to stop;
4. From September 2010 through January 2015, multiple incidents occurred in the office, which targeted Complainant, including: a) comments written on the sign-out board next to her name; b) her name tag on the sign-out board was erased and rewritten with fictitious locations; c) messages on her telephone answering machine were deleted; d) her computer software folder was intentionally deleted; e) her printer was unplugged; f) her monitors were turned off; g) multiple errors were created on her forecast while she was on temporary duty (TDY); h) coworkers were permitted to examine her leave requests; i) her car was keyed and spit on; j) trash was left in her refrigerator and on top of her desk; k) food was missing from her refrigerator; l) a large trash can and dead bugs were left on her desk; m) items from her desk were moved or disappeared; n) her desk chair was moved and left in the hallway; o) copies of a workplace bullying memorandum put up by Complainant were taken down; p) her work errors were made known to the office when those of others were not; and q) and coworkers asked Complainant's first level supervisor (S1) about Complainant's whereabouts during the day;
5. From September 2010 through January 2015, management officials failed to prevent the incidents described in claim 2 and similar incidents despite having been informed by Complainant that these incidents were occurring;
6. On September 12, 2010, Complainant's name was removed from a work assignment without explanation, and she was not allotted the scheduled overtime work or pay;
7. In April 2011, the Lead Range Scheduler modified Maintenance and Operations Control Center (MOCC) slides and sent them to several office personnel;
8. In May 2011, many of Complainant's computer files were lost when Complainant migrated to Windows 7;
9. From 2010 to 2012, S1 and his supervisor failed to adequately discipline C2 for or prevent C2 from sending out an email to other coworkers discussing alleged errors in Complainant's work;
10. On November 30, 2011, C2 got angry at Complainant for working on forecast requests while he was on leave;
11. On approximately December 31, 2014, Complainant's quarterly performance review contained negative comments;
12. On December 3-5, 2014, and on multiple prior occasions, management failed to prevent C2 from verbally attacking (scolding, belittling, reprimanding) and embarrassing Complainant in the workplace; and

13. On January 31, 2012, Complainant's entire office was notified that Complainant would be moved to another position before Complainant was informed about the move.

At the conclusion of the 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.

While Complainant's hearing request was pending, Complainant filed a second formal complaint, wherein she alleged that the Agency had subjected her to additional acts of harassment on the basis of her sex. The Agency accepted the following claims for investigation:

14. From March 28, 2016 through June 3, 2016, Complainant found multiple derogatory and anti-female union representative articles posted on the breakroom bulletin boards, and management failed to address the discriminatory actions;
15. On April 13, 2016, C2 entered Complainant's work area and repeatedly made loud pounding noises on the shredder bins causing Complainant to have a panic attack and seek medical attention;
16. On April 19, 2015, the office television in Complainant's work area was turned off permanently by management in an effort to dissuade C2 from intentionally loitering in the vicinity of Complainant's workspace to cause her emotional distress;
17. C1 showed animosity towards Complainant and her union activities; and
18. On April 26, 2016, management told Complainant to work from an alternate duty location on April 29, 2016, in order to avoid C1 and prevent a hostile incident.

Her second formal complaint also included one claim of reprisal when:

19. On May 20, 2016, S1 responded to Complainant's request for union time by stating, "I am doing everything I can to support you, but it's just not good enough. [The Chief of Scheduling] and I were both thrown under the bus due to your EEO complaint. If I don't give you time, you're just going to file a grievance."

Following the investigation into the second formal complaint, Complainant filed a request for a hearing. On September 28, 2017, the Agency filed a motion to consolidate the two complaints, which the assigned AJ granted on December 6, 2017.

Thereafter, on January 8, 2018, the Agency filed a motion for a decision without a hearing. Complainant timely filed an opposition to the Agency's motion, arguing that there were sufficient genuine issues of material fact to preclude the issuance of a decision without a hearing.

Over Complainant's objections, the AJ granted the Agency's motion for a decision without a hearing and issued a decision without a hearing on February 6, 2020. When the Agency failed to issue a final order within 40 days of receipt of the AJ's decision, the AJ's decision became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i). The instant appeal followed.

### ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). 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. In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review..."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (as revised, August 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus. Upon review, we find that summary judgment was appropriate as the record had been adequately developed and that there were no material facts in dispute.

#### *Claims 1-18*

With regard to claims 1-18, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged. Here, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor.

#### *Claim 19*

For claim 19, however, we find that the Agency subjected Complainant to discrimination on the basis of reprisal when S1 accused Complainant of throwing him and the Chief of Scheduling under the bus by filing an EEO complaint. As a general matter, the statutory anti-retaliation provisions prohibit any adverse treatment that is sufficient to dissuade a "reasonable person" from making or supporting a charge of discrimination. See Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016). Although petty slights and trivial annoyances are not actionable, adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable. *Id.*

Given the importance of maintaining "unfettered access to [the] statutory remedial mechanisms" in the anti-retaliation provisions, we have found a broad range of actions to be retaliatory.

For example, we have held that a supervisor threatening an employee by saying, “What goes around, comes around” when discussing an EEO complaint constitutes reprisal. Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), req. for recons. den., EEOC Request No. 0520090654 (Dec. 16, 2010). We have also found reprisal when a supervisor accused a subordinate employee of lying to the EEO Office, as such accusations could “potentially chill an employee from participating in the EEO complaint process.” See Celine D. v. U.S. Postal Serv., EEOC Appeal No. 0120150178 (Mar. 2, 2017), req. for recons. den., EEOC Request No. 0520170258 (June 15, 2017).

In this case, the record reflects that Complainant sent S1 an email on May 19, 2016, to request union time. When S1 failed to respond to her email, Complainant went to S1 to discuss the matter with him. Complainant alleged that during their meeting to discuss her union work, S1 brought up her EEO activity by stating, “I am doing everything I can to support you, but it’s just not good enough. [The Chief of Scheduling] and I were both thrown under the bus due to your EEO complaint. If I don’t give you the time, you’re just going to file a grievance.” See Report of Investigation (ROI) for Agency No. 5Z1S16003 at 000425. During the EEO investigation, S1 readily admitted that he made the alleged comments. Id. at 000462. However, S1 explained that he did so because Complainant was allegedly yelling at him and threatening to file a grievance if he did not give her union time. Id. S1 emphasized that he ultimately granted Complainant’s May 19, 2016 request. Id.

While we are mindful of the Agency’s contention on appeal that the comments at issue were in reference to Complainant’s union work and grievances, and not her EEO activity, we find such contention to be unpersuasive. As discussed above, the record clearly shows that while Complainant was attempting to talk to S1 about her union work, S1 raised Complainant’s EEO activity by accusing Complainant of throwing him and the Chief of Scheduling “under the bus by filing an EEO complaint.” In light of S1’s admission, we find that he unequivocally referenced Complainant’s protected EEO activity during his meeting with Complainant.

Therefore, the only question that remains for us to decide is whether the expression, “throw under the bus by filing an EEO complaint” would be sufficient to dissuade a “reasonable person” from making or supporting a charge of discrimination. We find that it would. In our view, such expression, in the context made by S1, is akin to accusing someone of betrayal or disloyalty. This is particularly true in situations such as this, where S1 expressed dismay that Complainant would file an EEO complaint against him even after everything he did for her. As accusations of betrayal could have a chilling effect on the willingness of employees to raise complaints through the EEO process, we conclude that the Agency subjected Complainant to unlawful retaliation as alleged in claim 19. Complainant may be entitled to compensatory damages to the extent that she is able to show a compensable harm as a result of the retaliatory incident. Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009) (citing Binseel v. Dep’t of the Army, EEOC Request No. 05970584 (October 8, 1998)) (a finding of “per se” retaliation does not automatically entitle a complainant to a damages award).

### CONCLUSION

We AFFIRM the Agency's final order on claims 1-18. However, on claim 19, we REVERSE the Agency's finding of no discrimination and REMAND the claim to the Agency for further processing. The Agency shall comply with the relief in the following Order.

### ORDER

The Agency shall take the following actions:

1. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall complete 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. The Agency shall pay this amount to Complainant within **thirty (30) calendar days** of the date of the determination of the amount of compensatory damages. 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."
2. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall provide eight hours of interactive EEO training to S1.<sup>2</sup> The required training shall address S1's responsibilities with regard to eliminating discrimination in the workplace particularly regarding reprisal.
3. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall consider taking disciplinary action against S1. The Commission does not consider training to be a disciplinary action. The Agency shall report its decision to the Commission and specify what, if any, action was taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline.
4. The Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

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<sup>2</sup> S1 is identified on page 00456 of the ROI for Agency No. 5Z1S16003.

POSTING ORDER (G0617)

The Agency is ordered to post at its 2nd Range Operations Squadron at Vandenberg Air Force Base 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

May 19, 2021

Date