



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

[REDACTED]  
Michael S.,<sup>1</sup>  
Complainant,

v.

Christine Wormuth,  
Secretary,  
Department of the Army,  
Agency.

Appeal No. 2020000817

Hearing No. 440-2019-00027X  
Agency No. ARUSAR17OCT03929

**DECISION**

On October 16, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), per 29 C.F.R. § 1614.403(a), from a September 13, 2019 final Agency decision (FAD) on 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 Recreation Assistant, NF-0189-02 at Family Morale Welfare Recreation (MWR), Business Recreation Division, Outdoor Recreation, Pine View Campground in Wisconsin.

On February 13, 2018, Complainant filed an EEO complaint, as amended, alleging the Agency subjected him to discrimination and harassment based on reprisal for prior protected EEO activity under Title VII when:

1. Management failed to take appropriate action to correct his coworker's ("CW1") (Recreation Assistant, Outdoor Recreation - Equipment Checkout, male) inappropriate

---

<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.

language, degradation of women, and general lewd behavior, and emotional abuse by his second line supervisor (“S2”) (Chief, Outdoor Recreation).

2. On July 7, 2017, CW1 made a disparaging sexual comment toward him and their coworker (“CW2”) (Recreation Assistant, Outdoor Recreation, female).
3. Since July 18, 2017, after he reported sexual harassment, management did not take appropriate action to resolve the issue.<sup>2</sup>
4. On July 27, 2017, S2 told him the initial investigation report by Complainant’s first line supervisor (“S1”) (supervisory Recreation Specialist, Outdoor Recreation) on his sexual harassment report was not accepted, effective that day or the next he was assigned to work outside, which continued into October 2017 – about 12 weeks, and on September 27, 2017, S2 told him he blamed him for creating a hostile work environment.
5. On September 27, 2017, S2 accused him of making the most mistakes when updating the campground’s customer reservation system.
6. It did not give him a copy of the initial investigation by S1.
7. The Chief, Business and Recreation Division, who assumed that role in March 2018, and also performed S2’s role starting around S2’s May 2018 retirement, failed to address the employee shortage.
8. The supervisory Recreation Specialist, Outdoor Recreation, who was also the reservation system lead “(Tracker Lead)”, failed to assist with duties related to customer assistance and management at Pine View Campground.

After an EEO investigation, the Agency gave Complainant a copy of the report of investigation (ROI) and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant requested a hearing, but the AJ denied the request as a sanction. The AJ remanded the complaint to the Agency, which issued a FAD finding no discrimination. The instant appeal followed.

---

<sup>2</sup> The Agency defined this issue in terms of CW1 publicly humiliating and shaming him for reporting sexual harassment. The EEO investigator asked Complainant to explain this, and he replied he was not sure what the question was. We find he did not intend to bring this matter.

### ANALYSIS AND FINDINGS

#### *Denial of hearing*

An AJ has authority to sanction a party for failure, without good cause shown, to fully comply with an order. 29 C.F.R. § 1614.109(f)(3). Where a lesser sanction would suffice to deter the conduct or equitably remedy the opposing party, an AJ may be abusing her discretion to impose a harsher sanction. Hale v. Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000).

In her March 5, 2019 Acknowledgement Order, the AJ warned Complainant that if he failed to timely comply with her orders, his hearing request could be dismissed. At the Initial Status Conference held on April 10, 2019, the parties agreed to a schedule on discovery and the AJ directed all pre-hearing submissions be submitted by on June 26, 2019. At this time, the AJ warned Complainant that even though he was unrepresented he must still meet filing deadlines. After the Initial Status Conference, on April 10, 2019, the AJ issued a Scheduling Order that again warned Complainant if he failed to comply with her orders, his hearing request could be dismissed. Complainant failed to file his pre-hearing submissions by June 26, 2019, as ordered on April 10, 2019. On June 27, 2019, the AJ issued Complainant an Order to Show Cause to explain by July 8, 2019, why sanctions should not be imposed for not complying with the April 10, 2019 order. On July 7 & 8, 2019, Complainant submitted a total of eight documents including his pre-hearing submissions and opposition to the Agency's Motion for Summary Judgment but did not explain why sanctions should not be imposed.

On appeal, Complainant concedes he made mistakes in keeping with the AJ's Scheduling Order but does not explain why he failed to do so. Because Complainant has not provided an explanation for his tardiness, we have no reason to further examine the AJ's decision to dismiss Complainant's hearing request.

#### *Issues 1 – 4: Matters associated with Complainant's report women were sexually harassed*

By text on July 7, 2017, Complainant reported to the Custodial Worker Supervisor he witnessed CW1 that day say to CW2 he would "never fuck her, ha, ha, and in fact I wouldn't fuck you with [Complainant's] dick". This supervisor forwarded the text to S1, and word got to Complainant's third line supervisor ("S3") (Program Director, MWR at Fort McCoy).

S3 directed S2 to look into Complainant's report, who tasked S1 to get statements from all involved. S1 started doing so by July 11, 2017. In his statement for S1, Complainant added he saw CW1 horsing around and jabbing their coworker ("CW3") (Recreational Assistant, Outdoor Recreation, female) crotch, and peer pressure worked for CW1 in terms of people not coming forward. He wrote CW1 says vulgar things even when people are on the telephone with customers, and his requests to him to quiet down are answered with verbal ridicule.

In her statement to S1, CW2 wrote that he said “you should have gotten laid last night – you’re so prissy today”, that “I feel its uncomfortable and [illegible] when he says things”, and CW1 and CW3 “wrestle and grab each other[']s private parts.” ROI, Sec. 7.4.f. Attch. 3, Bates No. 276 (bottom right corner).

In her EEO investigative statement, another coworker of Complainant (“CW4”) (Recreational Assistant, Outdoor Recreation, female) wrote she was approached by S1 and asked if she saw any inappropriate behavior. She continued that she saw CW1 joking around and making sexual innuendos toward women, like “I’d hit that” when an attractive customer came in, she told CW1 this behavior made her uncomfortable and to stop, and he did so around her. The record does not contain a statement by CW4 given to S1.

S3 stated he received the statements S1 gathered and was disappointed with the quality of her inquiry, so he elevated the matter to the command for a formal investigation. It did a preliminary inquiry, and on August 4, 2017, issued a report with conclusions and recommendations. The statements S1 gathered from Complainant and CW2, and perhaps others, were forwarded to the command investigator.

The command investigator took notes of his conversations with witnesses. In them, the investigator recounted CW2 said S1 basically told her what to write in her statement for S1, and she never heard what Complainant accused CW1 of saying. The investigator recounted that CW3 said Complainant’s statement about her and CW1 was untrue, she is good friends with CW1, and all this had nothing to do with sexual harassment.

CW2 also gave the command investigator written memos stating as follows. Employees jokingly say inappropriate things, but they were all included, if it goes too far, they stop. Work is fun until Complainant arrives and they have to watch what they say because if it is inappropriate, he will say so. She and CW1 work great together, and he is positive and amazing with customers. Complainant’s overall performance and identified aspects thereof is poor. Complainant said CW1 and CW3 were having sex and needed to stop working together. She likes working with everyone but Complainant, he went too far when he reported matters to S1 (which he did around July 11, 2017), and he needs to be talked to about his people problems.

The command investigator recounted that CW2 did not like that S1 was going after CW1, CW3 was mad at S1, and that CW3 said Complainant’s performance is poor and everyone but him enjoys working with CW1. The investigator recounted that S2 said CW1’s jokes were accepted by most employees, but not Complainant.

Complainant stated he is age 60 and the female Recreational Assistants CW1 inappropriately interacted with were ages 18 – 20. He separately stated that in reporting what he saw, he acted on Agency sexual harassment annual training that instructs bystanders to report sexual harassment and indicated someone had to stand up.

The command investigator found that given the conflicting interview statements, there was insufficient evidence of sexual harassment, and further investigation was not warranted. He noted angst and friction between the younger generation and Complainant. The investigator recommended training on zero tolerance for harassment and maintaining professionalism in the workplace, and that MWR leadership reaffirm these principals. The training was done on October 24, 2017, for Complainant, CW1, CW4, and Complainant's work leader – a Lead Recreational Assistant.

Regarding being assigned to work outside, S3 stated he asked S2 to separate Complainant from CW1, but did not mandate he work outside – there were a number of things he could do within his job description. Complainant stated for his work outside, he was given about four assignments by his Work Leader, and nothing after that, so he took it upon himself to get a golf cart and pick up trash throughout the Pine View campground. He stated S2 laughed and made light of how he was treating him with other Recreational Assistants, and this was humiliating. CW4 stated she believed Complainant was told to work outside because he complained about sexual harassment to management. Complainant stated that in assigning him to work outside, S2 stated that his reporting sexual harassment to S1 caused a lot of hard feelings in the office, and he was making excessive mistakes on the campground reservation system. ROI, Sec. 7.4.i. (one of Complainant's rebuttal declarations), Bates No. 305.

In response to the EEO investigator's question of why he assigned Complainant to work outside, S2 stated:

The environment inside the office had become uncomfortable, morale had gone down. The staff he had identified as being able to substantiate his complaint had all indicated the allegation was false. They stated they were uncomfortable working with Complainant. I met with Complainant and told him I was going to have him work outside the office and he was unhappy about the decision. I explained morale was really low and his error rate had increased and was really high and in the best interests of the organization I would have him work outside.

The error rate referred to Complainant making mistakes in the campground reservation system, resulting in double bookings and the like.

In its FAD, the Agency found that management moved Complainant outside because his interactions with coworkers did not contribute to positive teamwork and was hurting morale. It pointed to CW2 stating Complainant was not personable with his coworkers – not smiling or speaking to them and quoted from S2's statement above. The Agency found that while Complainant's assignment outside coincided with his reporting sexual harassment, management provided a nondiscriminatory reason for taking this action. On appeal, the Agency adds that because working outside was within Complainant's position description it was not discipline and he was not aggrieved.

A complainant may establish a prima facie case of reprisal discrimination by showing that: (1) he engaged in protected activity, (2) the agency was aware of his protected activity; (3) he was subjected to treatment that would reasonably likely deter EEO activity; and (4) a nexus exists between the protected activity and the treatment. Souza v. Navy, EEOC Appeal No. 01A31129 (Feb. 3, 2004), Whitmire v. Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

Complainant engaged in EEO activity by making reports of sexual harassment, and S1, S2, and S3 were aware of this. We credit Complainant's statement that S2, in assigning him to work outside, said his reporting sexual harassment to S1 caused a lot of hard feelings in the office. S2's own explanation for why he assigned Complainant to work outside confirmed Complainant. Given this, we find a nexus between the protected activity and Complainant being assigned outside.

The Agency's argument that Complainant was not aggrieved is unavailing because to rise to the level of actionable reprisal an action need only reasonably likely deter EEO activity. The Agency found that Complainant being assigned to work outside for about 12 weeks in the summer would not reasonably likely to deter protected EEO activity. But Complainant stated that while outside he only got about four assignments, and when he completed them, he got no more, so he took it upon himself to collect trash. He stated S2 laughed about the way he was being treated, and on appeal avers it was hot outside. We find that assigning Complainant outside for 12 weeks was reasonably likely deter EEO activity and rendered him aggrieved, as well as rising to the level of actionable harassment. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) ("sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment").

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](http://eeoc.gov)). 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 assigning Complainant to work outside for 12 weeks may or may not have been a tangible employment action, we need not analyze this matter further because the Agency did not raise an affirmative defense.

We find that the part of issue 1 of management not taking action to stop CW1's sexual harassment of women, that issue 2 which regards CW1 making a disparaging sexual comment toward him and CW2, that issue 3 which regards management failing to take appropriate action after he reported sexual harassment, and the part of issue 4 of S2 blaming him for creating a hostile work environment are all background and evidence in support of Complainant's reprisal claim of being put outside for 12 weeks. We credit Complainant's blame contention because S2 admitted moving him outside for like reasons – which goes to retaliatory motive. To the extent S2's statements to Complainant on why he was assigned and continued to be assigned to work outside is causally connected to his emotional injuries, Complainant can also recover compensatory damages for this.

#### *Issues 5 - 8*

After a close review of the record, we find there is no causal nexus between the matters in issues 5 – 8, and the part of issue 1 about S2 subjecting Complainant to emotional abuse. As found in the FAD, this emotional abuse claim included S2 publicly loudly accusing Complainant of making negative ICE (some type of feedback system) comments about him was not inconsistent with S2's behavior toward others. The same is true regarding Complainant's contention that S2 chewed out the entire staff in accusing him of trying to make him look stupid regarding swimming safety rules Complainant communicated to a customer. Complainant stated S2 was a screamer who too often intimidated staff in rages.

Despite Complainant's claim to the contrary, the weight of the evidence is that he made much more errors in the customer reservation system than others or management believed this was so, which created problems like double bookings. We agree with the FAD that the Chief, Business and Recreation Division's decisions on staffing levels had nothing to do with Complainant. We also agree with the FAD that the Tracker Lead did not treat Complainant disparately when he did not assist – Complainant indicated this was his normal way of doing business.

S3 explained that Complainant was not given S1's management investigation because there was never a finished project, just a collection of handwritten statements. Regardless, we find this matter does not regard the terms and conditions of Complainant's employment, would not reasonably likely deter EEO activity, and fails to state a claim.

#### CONCLUSION

The FAD finding that Complainant was not subjected to retaliatory harassment when he was assigned to work outside for about 12 weeks, which includes management's negative explanations to him on why it did so, is REVERSED. The remainder of the FAD is AFFIRMED.

ORDER (C0618)

The Agency is ordered to take the following remedial action:

1. The Agency will immediately take steps to ensure that retaliating against workers at the MWR, Pine View Campground in Wisconsin for reporting sexual harassment, regardless of whether it meets the legal definition thereof, ceases and ensure that it takes steps to immediately address any reports of harassment.<sup>3</sup>
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 as set forth below.

POSTING ORDER (G0617)

The Agency is ordered to post at its MWR, Pine View Campground in Wisconsin, including the office where customer reservations were taken, 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.

---

<sup>3</sup> S1 has resigned, S2 has retired, CW1, CW2, and CW3 have resigned, and Complainant resigned effective September 28, 2019.

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)

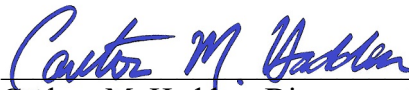
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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

September 8, 2021

Date