



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Nathanial E.,¹
Complainant,

v.

Debra A. Haaland,
Secretary,
Department of the Interior
(National Park Service),
Agency.

Appeal No. 2021000613

Agency No. DOI-NPS-19-0379

DECISION

On October 30, 2020, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's September 30, 2020, final decision concerning his equal employment opportunity (EEO) complaint alleging that he was subjected to a hostile work environment 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 REVERSES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Human Resources Specialist, GS-12, at the Agency's Washington Servicing Office, Workforce and Inclusion in Lakewood, Colorado.

On May 30, 2019, Complainant filed a formal complaint alleging that the Agency subjected him to a hostile work environment based on his sex (male/sexual orientation²) 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.

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

1. on April 19, 2019, Complainant discovered that Supervisor made comments about his sexual orientation in a chat message with a coworker; and
2. from September 2015 to the present, Supervisor was condescending to him in emails, attacked Complainant about his breaks and lunch periods, and excluded Complainant in the office in an effort to get him to resign.

The investigative record reflects the following pertinent matters relating to the subject claims.

On April 19, 2019, Complainant discovered that Supervisor made comments about his sexual orientation in a chat message with a coworker (Coworker 1). Report of Investigation (ROI) at 46. Complainant stated that Coworker 1 provided him with a PDF transcript detailing a chat log between the Supervisor and Coworker 1. In the chat, Supervisor discussed a general dislike of Complainant. ROI at 60-65. Complainant noted that Supervisor would made comments regarding his perceived sexuality such as, “well, he’s not gay? You sure?” ROI at 47-48; 55. Supervisor denied making comments regarding Complainant’s sexuality or knowing anything about the chat transcripts. ROI at 81-82. Coworker 1 stated that Supervisor believed Complainant was gay and made several comments about his sexuality to her. ROI at 148.

Complainant asserted that from September 2015 to the present, Supervisor was condescending to Complainant in emails, attacked him about his breaks and lunch periods, and excluded him in the office in an effort to get him to resign. ROI at 49; 67-68. Complainant noted that Supervisor had an issue with him and another female coworker (Coworker 2). Complainant stated that during a September 7, 2017, meeting with Supervisor, Complainant was informed that he would have to use the front or southside door when arriving and/or leaving the workplace. He noted that there’s a second door on the northside of the building that is commonly used which Supervisor barred him from using. Id. During this meeting, Complainant was also informed that he was only allowed two 15-minute breaks per workday and that they were not to be connected to his 30-minute lunch break. Additionally, he was told that there was no loitering in the parking lot after hours. Supervisor informed him that Coworker 2 and Complainant allegedly spent in inappropriate amount of time in the parking lot afterhours. Id.

On September 11, 2017, Complainant received a letter that outlined the comments made during the September 7, 2017, meeting. ROI at 69-70. Supervisor noted that the letter would not be filed anywhere except she would keep a copy in her personal files. ROI at 103-4. Supervisor asserted that Complainant and Coworker 2 would frequently sneak off and that several times she could not locate either of them. ROI at 82. Supervisor asserted that this was why she made it clear to Complainant and Coworker 2 what the break and lunch time limitations were, and her requests that they check in with her as they came and left. Id. Supervisor acknowledged that Complainant was on a maxi-flex schedule and asserted that despite being on such a schedule, it was simple courtesy to let her know his comings and goings. ROI at 106-108.

Complainant stated that the office wide maxi-flex schedule allowed employees to come and go as they pleased, so long as they worked 40 hours a week. Complainant asserted that Supervisor's requirement limiting his breaks and lunch time was, therefore, counter to the maxi-flex schedule for which he was approved. Complainant indicated that aside from Coworker 2, no one else was required to communicate or seek prior approval during the workday regarding leaving and coming. Coworker 1 confirmed that Complainant and Coworker 2 were asked to wave at Supervisor before they left work; that they were not allowed to use the side door by Supervisor's office; and that they had to watch their break times. ROI at 75. Coworker 1 confirmed that the entire office was on a maxi-flex schedule, but that Supervisor would only track Complainant's times throughout the day. ROI at 151.

Complainant asserted that Supervisor intentionally created a difficult workplace in an effort to drive him out. ROI at 53. For example, Complainant stated that he brought forth an issue to the Chief of Employee Benefits and Retirement Division (Chief) that Supervisor was being inappropriate in a series of October 2017 emails to him. ROI at 54. Complainant acknowledged that Chief asked Complainant what kind of resolution he wanted and that he had responded that he would "wait and see if it stops". ROI at 55. Complainant's emails made no reference to Complainant's sexuality but discussed Supervisor's general behavior towards him and his belief that the Supervisor harbored ill feelings towards him.

Coworker 1 asserted that Supervisor would often go out of her way to ignore Complainant and that she made no effort to include him in work conversations. ROI at 152. Coworker 1 asserted that Supervisor was very toxic and made it clear that she did not like Complainant. ROI at 149. Supervisor denied ever making the workplace hostile for Complainant. ROI at 85.

Chief asserted that he became aware of the sexual orientation comments made by the Supervisor on April 18, 2019, when Complainant, Coworker 1, and Coworker 2 showed him the transcript conversations between Coworker 1 and Supervisor. ROI at 134. Chief asked Complainant if he wanted to file a formal complaint with the Agency's Harassing Conduct Tracking System. ROI at 135. When Complainant confirmed yes, Chief entered in the formal complaint. Following the complaint's entry, he allowed Complainant and Coworker 2 to have extended telework because neither were comfortable being in the same space as Supervisor. ROI at 136. Chief also had several verbal counseling sessions between April 22 and 26, 2019, with the Supervisor regarding her behavior. Id. Based on the recommendations of the Employee Relations Specialist and the Solicitor's Office, Supervisor was removed from her supervisory responsibilities on April 29, 2019. Id.

At the conclusion of the investigations, the Agency provided Complainant with copies of the reports of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ).

On September 30, 2020, in accordance with Complainant's request, the Agency issued its final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency determined that Complainant was subjected to a hostile work environment by Supervisor.

However, the Agency determined that there was no basis to impute liability for Supervisor's actions to the Agency. Specifically, because Supervisor's actions did not result in a tangible employment action. The Agency stated that while Complainant was issued the letter regarding expectations for breaks and alleged loitering in the parking lot, the letter was never part of Complainant's permanent official personal file nor did it otherwise alter Complainant's position or work assignments. Accordingly, the Agency determined that the presentation of such a letter could not be deemed a tangible employment action.

Moreover, the Agency determined that it had exercised reasonable care to prevent and promptly correct any harassing behavior through its internal workplace harassment policy once Complainant made a claim of harassment. The Agency noted that it also allowed Complainant to maximize telework in order to avoid Supervisor while the Agency worked to resolve the situation. The Agency noted that Supervisor was eventually transferred into a lower grade position with another bureau within the Agency. In conclusion, the Agency found that the preponderance of the evidence supported Complainant's claims of unlawful harassment but that it also established that the Agency had effectively raised an affirmative defense to avoid liability.

CONTENTIONS ON APPEAL

On appeal, Complainant asserts that management was aware of his hostile work environment claim and is inappropriately attempting to avoid liability. Complainant states that he feared reprisal if he pushed the matter, noting that Supervisor had made thinly veiled threats and remarks "about knowing who goes to upper management" regarding her actions in the workplace. See Complainant's Appeal Brief.

The Agency reiterates that while the preponderance of the evidence supports Complainant's claims of unlawful harassment, the Agency was able to raise an affirmative defense to avoid liability. Given the record, the Agency requests that the Commission affirm its decision.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDING

In considering whether any of the actions listed by Complainant, whether individually or collectively, constitute harassment, the Commission notes that in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), that harassment is actionable if it is sufficiently severe or pervasive that it results in an alteration of the conditions of the complainant's employment. See EEOC Notice No. 915.002 (March 8, 1994), Enforcement Guidance on Harris v. Forklift Systems, Inc. at 3. To establish a claim of harassment a complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to unwelcome verbal or physical conduct; (3) the harassment complained of was based on a statutorily protected class; (4) the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See McCleod v. Soc. Sec. Admin., EEOC Appeal No. 01963810 (Aug. 5, 1999) (citing Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)).

In this matter, the Agency has conceded that Complainant was subjected to a hostile work environment by the Supervisor. Accordingly, based on the record, we find that Complainant has established parts 1 through 4 of an unlawful harassment claim. Our concern on appeal is part 5.

Regarding part 5, an employer is subject to vicarious liability for harassment when it is "created by a supervisor with immediate (or successively higher) authority over the employee." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2270 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2292-93 (1998). When the harassment does not result in a tangible employment action being taken against the employee, the employer may raise an affirmative defense to liability. The Agency can meet this defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (a) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (b) that the complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. Burlington Industries, Inc., 118 S.Ct. at 2270; Faragher, 118 S.Ct. at 2293; Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, *supra*.

Here, the Agency determined in its final decision that there was no basis for imputing liability. The Agency noted that because the harassment did not result in a tangible employment action, it was able to raise an affirmative defense to liability. However, based on the Commission's review of the record, we find that the affirmative defense is not available as the harassment *did* result in a tangible employment action being taken against Complainant. See *id.* at IV(c); see also Judie D., v. Dep't of Veterans Affs., EEOC Appeal No. 2020002526 (Sept. 7, 2021). The Agency is attempting to avoid liability by asserting that the Supervisor's September 7, 2017, meeting and subsequent September 11, 2017, letter were not tangible because it never became part of his permanent official file and/or alter his position, terms and conditions in anyway. We disagree. Based on our review of the record, the Commission finds that Supervisor's actions created a tangible employment action taken against Complainant.

The record demonstrated that Complainant, along with his colleagues, were all on a maxi-flex schedule, allowing employees to essentially set his/her own hours of 80 hours per pay cycle. Despite this approved work schedule, Supervisor made it clear to Complainant that he was only allowed strict break and lunch times. Additionally, despite his maxi-flex schedule, Complainant was informed that he was to notify Supervisor any time that he was leaving his workspace. Lastly, Supervisor acknowledged that she informed Complainant that he was only allowed to use certain doors for exiting and entering. We find these actions constitute tangible employment actions as they altered the terms and conditions of Complainant's employment.

In consideration of the entire record, we find that Complainant established that the Agency violated Title VII when it subjected him to a hostile work environment based on his sex for which the Agency could not avoid liability.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final decision and REMAND the matter for further processing accordance with the ORDER below.

ORDER

The Agency is ordered to take the following remedial actions:

1. The Agency shall conduct a supplemental investigation on compensatory damages, including providing Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages. Thereafter, within **ninety (90) calendar days** of the date this decision is issued, the Agency shall determine the amount of compensatory damages to be awarded. Within thirty (30) days of determining the amount of compensatory damages, the Agency shall pay Complainant the compensatory damages.
2. We note that the Supervisor was removed from her supervisory position and transferred to another bureau within the Agency. Accordingly, within **ninety (90) calendar days** of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive training to Supervisor regarding her responsibilities with respect to eliminating discrimination in the federal workplace.
3. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall consider taking disciplinary action against Supervisor. The Agency shall report its decision. If the agency decides to take disciplinary action, it shall identify the action taken. If the agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline.
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.

POSTING ORDER (G0617)

The Agency is ordered to post at its Washington Servicing Office, Workforce and Inclusion facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

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

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

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

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

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

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

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

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

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


COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

January 13, 2022
Date