



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Arden V.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Northeast Area),
Agency.

Appeal No. 2021000815

Hearing No. 520-2020-00275X

Agency No. 4B-110-0040-19

DECISION

On November 12, 2020, 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 November 3, 2020 final order concerning an 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

During the period at issue, Complainant worked for the Agency as a city carrier at the Agency's St. Albans Station in Jamaica, New York.

On March 25, 2019, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him based on race (Hispanic)² 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 The Commission notes that Complainant stated that his race is "Hispanic." The Commission considers the term "Hispanic" to denote a national origin rather than a race. Nonetheless, claims

1. On October 12, 2018, Complainant was issued a Notice of Removal for Failure to Follow Instructions/Failure to Satisfactorily Perform the Duties of his position;
2. October 29, 2018, Complainant was placed on Emergency Placement in Off-Duty Status (Without Pay);
3. On November 14, 2018, Complainant received notification to report to the St. Albans Post Office;
4. On November 15, 2018, Complainant was issued a Notice of Removal for Failure to Follow Instruction/Failure to Satisfactorily Perform the Duties of His Position;
5. On December 4, 2018, upon returning to the office from delivering his route, Complainant was given instructions to get off the clock immediately and the supervisor made the comment "I do not feel comfortable working around you when we are alone."
6. On December 13, 2018, Complainant was issued a Fourteen (14) Day Suspension (No Time-Off) for Failure to Follow Instructions/Failure to Satisfactorily Perform the Duties of His Position;
7. On December 14, 2018, Complainant was issued a Notice of Removal for Failure to Follow/Instructions/Failure to Satisfactorily Perform the Duties of his Position;
8. On February 2, 2019 and February 26, 2019, upon being told to go load his truck the supervisor followed Complainant and stared at him. The supervisor started to throw the parcels in Complainant's vehicle while making inappropriate comments;
9. On February 2, 2019, and February 26, 2019, the Manager Customer Service (MCS) Complainant's request for auxiliary assistance (PS Form 3996) was denied, and he teased Complainant publicly regarding a private conversation he had with her regarding his employment;
10. On February 22, 2019, Complainant was issued a Notice of Removal for Failure to Follow Instructions/Absent from Scheduled Overtime;
11. On March 1, 2019, the manager waved his finger in Complainant's face, denied his request for auxiliary assistance (PS Form 3996) and sat in a chair and watched him;

of race discrimination are analyzed under the same framework as claims of national origin discrimination.

12. On March 7, 2019, Complainant was placed on Emergency Placement in Off-Duty Status (Without Pay);
13. On February 16, 2019, Complainant supervisor invaded his personal space and followed him to the restroom;
14. On February 25, 2019, Complainant was the only employee not allowed to tie his DPS Mail;
15. On April 26, 2019, and May 3, 2019, management sent letters to Complainant's residence scheduling a Pre-Disciplinary Interview; and
16. On May 14, 2019, Complainant was issued a Notice of Removal.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's September 23, 2020 motion for a decision without a hearing. The AJ issued a decision by summary judgment on October 21, 2020, concluding neither race discrimination nor unlawful retaliation was established as alleged. The Agency subsequently issued a final order adopting the AJ's conclusions.

The instant appeal followed. On appeal, Complainant did not submit any briefs or make any statements.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for 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 "material" fact has the potential to affect the outcome of a case.

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. James v. U.S. Postal Serv., EEOC Appeal No. 01A13543 (Feb. 28, 2002). See also, Anderson, 477 U.S. at 247. We have recognized that not every factual dispute qualifies as a genuine issue that will prevent summary judgment. Adah P. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120140100 (Mar. 31, 2016); Complainant v. Dep't of Justice, EEOC Appeal No. 0120120271 (Aug. 21, 2014). Here, Complainant has failed to point with any specificity to particular evidence in the investigative file or other evidence of record that indicates a dispute of material fact necessitating a hearing. For the reasons discussed below, we find that, even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in his favor.

Race Harassment Claim

To prove his racial harassment claim, Complainant must establish that he 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, x, y or z. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also, Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

Here, as stated in the AJ’s decision, the majority of allegations proffered by Complainant in support of his racial harassment claim are related to Complainant’s conduct and performance. The conduct includes repeated incidents of failure to finish his route on time, failing to consistently request assistance when he was unable to do so, and failure to report to his tours of duty and scheduled overtime. Additionally, Complainant was disciplined for unauthorized absences, failures to follow instructions, engaging in wasting practices, and for sexually harassing a customer. Further, Complainant was twice placed on emergency placement without pay. The second emergency placement related to the customer’s claim of sexual harassment, including allegations of Complainant coming to the customer’s house as late as 8:00 and 9:00 p.m., which Complainant admitted. The customer made numerous other allegations, and a pre-disciplinary investigation (PDI) was scheduled for Complainant to explain his position. Complainant failed to appear three times for the PDI. The allegations were significant, and Complainant was placed on emergency placement, which resulted in a Notice of Removal, later reduced to a 14-Day Suspension after Complainant reached settlement following a grievance. The Agency issued Complainant five Notices of Removal. The AJ stated that the record clearly indicates that, aside from Complainant’s conduct, the underlying issue was a personality dispute between Complainant and supervisors.

Further, the AJ concluded nothing in the record indicated that the conflicts between Complainant and any of his supervisors was based on Complainant's race. Finally, the AJ stated Complainant's race harassment claim must fail for lack of discriminatory intent as to the responsible management officials.

We agree with the AJ that the image which emerges from considering the totality of the record is that there were conflicts and tensions with Agency management style that left Complainant feeling aggrieved. However, the statutes under the Commission's jurisdiction do not protect an employee against all adverse treatment. See Bouche v. U.S. Postal Serv., EEOC Appeal No. 01990799 (Mar. 13, 2002). See also Jackson v. City of Killeen, 654 F.2d 1181, 1186 (5th Cir. 1981) ("Title VII is not a shield against harsh treatment at the workplace; it protects only in instances of harshness disparately distributed. The essence of the action is, of course discrimination."). Discrimination statutes prohibit only harassing behavior that is directed at an employee because of his or her protected bases. Here, the preponderance of the evidence does not establish that S1 was motivated by discriminatory or retaliatory animus. Complainant's claim of racial harassment is precluded based on our findings that he failed to establish that any of the actions taken by the Agency were motivated by his protected bases. See Oakley v. U.S. Postal Service, EEOC Appeal No. 01982923 (Sept. 21, 2000).

Retaliation Claim

Regarding the AJ's retaliation analysis, the AJ noted that Complainant asserted that the Agency became aware of his EEO activity on March 1, 2019, and that the situation thereafter intensified. The AJ noted, however, that all but three of the 16 Complainant's allegations occurred *prior* to March 1, 2019, and therefore, the first 13 allegations of his complaint cannot establish his claim of unlawful retaliation. Regarding the remaining three allegations, the AJ determined that when all the allegations in the complaint are viewed together, they do not reveal any "uptick" in the frequency or intensity of the Agency's actions adverse to Complainant after management became aware of his EEO activity. The AJ concluded that Complainant was unable to establish a nexus between his protected activity and the alleged retaliatory conduct. We find no reason to disturb the AJ's analysis, which is supported by the evidence of record.

CONCLUSION

We AFFIRM the Agency's final order implementing the AJ's decision by summary judgment concluding no unlawful discrimination or retaliation was established.

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).

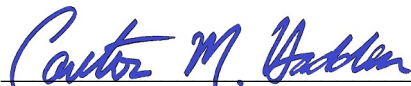
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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. 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

January 11, 2022

Date