



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]

Lelah T.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Field Areas and Regions),
Agency.

Appeal No. 2021001870

Hearing No. 480-2020-00798X

Agency No. 1F-921-0020-20

DECISION

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 January 13, 2021 final order concerning an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.

BACKGROUND

During the period at issue, Complainant worked for the Agency as a Postal Support Employee in San Diego, California.

On April 2, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African), sex (female), religion (Muslim), and in reprisal for prior protected EEO activity (allegations of sexual assault). By letter dated April 30, 2020, the Agency accepted the formal complaint for investigation and determined that it was comprised of the following claims:

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.

Complainant was subjected to a hostile work environment when:

1. On December 15, 2019, [Complainant was] sexually assaulted by a co-worker (C1) and management did not address the issue;
2. On December 16 and December 23, 2019, a supervisor made comments to [her] that [she] felt constituted harassment; and
3. On December 20, 2019, [Complainant was] not allowed to meet with the Manager Distribution Operations.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

On October 19, 2020, the AJ issued an Acknowledgment Order. Therein, the AJ, in pertinent part, ordered the parties to provide a Preliminary Case Information (PCI) report no later than 15 days from the date of the Acknowledgment Order. The AJ indicated that the PCI could be uploaded to the EEOC Public Portal. The AJ indicated further that if Complainant did not have a portal account, the AJ provided an email address for the Commission's Los Angeles District Office. The AJ stated that failure to submit the PCI could result in sanctions, such as waiver of discovery, denial of motions in the areas addressed in the PCI, dismissal of the hearing request, or default judgment against the Agency. The Agency's complaint file, submitted on appeal, reflects that Complainant filed the PCI with the Agency on October 27, 2020. However, the record is devoid of evidence that Complainant timely filed this document via the Public Portal or the Commission's email address provided by the AJ.

On December 3, 2020, the AJ issued an Order to Show Cause. The AJ stated that Complainant failed to submit the PCI report as set forth in her Acknowledgment Order. The AJ ordered Complainant to file a declaration showing good cause why she failed to comply with the PCI Order before noon on December 10, 2020.

On December 4, 2020, Complainant submitted medical documentation indicating that she was being treated for Post-Traumatic Stress Disorder due to the events set forth in claim (1). However, Complainant did not submit a declaration explaining why she did not file her PCI report, as directed by the AJ's Order to Show Cause.

On December 21, 2020, the Agency filed a Motion for a Decision Without a Hearing. Complainant did not respond to the Agency's Motion.

On January 6, 2021, the AJ issued a decision by summary judgment finding that Complainant failed to establish that she was subjected to unlawful discrimination. The AJ, in a footnote, stated that he was imposing the sanction of waiver of discovery for Complainant's noncompliance with respect to the submission of the PCI.

The AJ also noted that Complainant did not file a response to his Show Cause Order but rather filed a supplement with doctor's notes. The AJ stated that he would not address Complainant's failure to respond to his Show Cause Order but would address the case on the merits pursuant to the Agency's Motion.

Regarding claim (1), the AJ noted that the co-worker at issue (C1) (male) was reassigned to an area on the opposite side of the facility. In addition, the AJ stated that the Agency promptly conducted an investigation and Complainant's supervisor (S1) determined that inappropriate touching occurred and issued C1 a 14-Day Suspension. Based on the foregoing, the AJ found that the Agency promptly investigated Complainant's claim and took effective corrective action.

Regarding claim (2), that a supervisor made comments to Complainant such as "I understand some cultures don't like being touched. You better not get too close to her," the Agency found that this alleged incident did not rise to the level of unlawful harassment. In addition, regarding claim (3), Complainant being instructed to speak to her lower chain of management before going to senior management with her concerns, the AJ noted that the Agency took swift action to investigate Complainant's claim involving her co-worker and issued corrective action; thus, the AJ found that this matter was not sufficiently severe or pervasive to constitute harassment.

On January 13, 2021, the Agency issued a final order implementing the AJ's decision.

Complainant filed the instant appeal. Complainant reiterates that she was sexually assaulted by C1 and does not believe that management handled the claim appropriately. Complainant's representative, an employee at the same facility, asserts that he has been subjected to racist behavior by management in the past.²

ANALYSIS AND FINDINGS

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. (Aug. 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). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See *id.* at Chapter 9, § VI.A. (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

² The events the representative refers to appear to be unrelated to the matters herein.

of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

AJ's Sanction

As an initial matter, we address the AJ's sanction of waiving discovery for Complainant's failure to properly file her PCI report via the EEOC public portal or the email address provided by the AJ. As discussed above, the AJ issued an October 19, 2020 Order directing the parties to submit a PCI report within 15 days of the Order. While the complaint file submitted by the Agency on appeal reflects that Complainant submitted the PCI to the Agency on October 27, 2020, the record is devoid of evidence that Complainant submitted the PCI report to the AJ either via the EEOC Public Portal or at the email address as set forth in his October 19, 2020 Order.

The Commission has held that sanctions, while corrective, also act to prevent similar misconduct in the future and must be tailored to each situation, applying the least severe sanction necessary to respond to the party's failure to show good cause for its actions, as well as to equitably remedy the opposing party. Rountree v. Dep't of the Treasury, EEOC Appeal No. 07A00015 (July 13, 2001); Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000). The Commission has emphasized that the purpose of the sanction is to deter the underlying conduct of the non-complying party. See Barbour v. U.S. Postal Serv., EEOC Appeal No. 07A30133 (June 16, 2005).

The factors relevant to "tailoring" a sanction, or determining whether a sanction is, in fact, warranted include: 1) the extent and nature of the non-compliance, including justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice, if any, and (4) the effect on the integrity of the EEO process. Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (March 1, 2007); Voysest v. Soc. Sec. Admin., EEOC Appeal No. 01A35340 (Jan. 18, 2005).

The AJ's sanction of waiver of discovery was appropriately tailored to the instant matter. Complainant's non-compliance involved a single incident-failure to provide the AJ, as ordered, with the PCI report via the Public Portal or the specified email address set forth in the AJ's Order. However, Complainant timely submitted the PCI report to the Agency so the prejudicial effects of Complainant's non-compliance on the Agency were minimized. While we do not find that Complainant willfully failed to act with due diligence with respect to the AJ's Order regarding the PCI report, she has not presented any arguments on appeal that the denial of discovery impacted her ability to present her case. We also note that Complainant failed to respond to the Agency's motion for summary judgment, where she could have also identified the need to engage in discovery. Based on the foregoing, we find that the AJ's sanction was appropriate and narrowly tailored to the instant matter.

Decision by Summary Judgment

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.

Here, Complainant has failed to point with any specificity to particular evidence in the investigative file or other evidence of record that indicates such a dispute. 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 her favor.

Claim (1)-Unwelcomed Touching By C1

It is well-settled that sexual harassment in the workplace constitutes an actionable form of sex discrimination under Title VII. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). In order to establish a prima facie case of sexual harassment, complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct; (3) that the conduct complained of was based on her sex; (4) that the conduct had the purpose or effect of unreasonably interfering with her work performance and/or created an intimidating hostile, or offensive work environment; and (5) that 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 the instant matter, we assume arguendo, like the AJ, that the alleged incident occurred as set forth by Complainant and that it was sufficiently severe to constitute sexual harassment.³ Thus, we assume arguendo that Complainant established prongs (1)-(4) of a prima facie case of sexual harassment.

³ Complainant's supervisor (S1), in an affidavit attached to the Agency's Motion, sets forth that an investigation found that C1 (male) did engage in unwelcome touching. In her affidavit submitted during the investigation into her complaint, Complainant alleged that CW pushed up against her face-to-face and touched her rear end with his hand.

The inquiry here is focused on the fifth prong of the prima facie case: whether the Agency is liable for C1's actions. In the case of co-worker harassment, an agency is responsible for acts of harassment in the workplace where the Agency (or its agents) knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. 29 C.F.R. § 1604.11(d); Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999). What is appropriate remedial action will necessarily depend on the particular facts of the case, such as the severity and persistence of the harassment and the effectiveness of any remedial steps. See Taylor v. Dep't of the Air Force, EEOC Request No. 05920194 (July 8, 1992). However, when an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. Policy Guidance on Current Issues of Sexual Harassment, N-915-050 (Mar. 19, 1990). The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment and prevent the misconduct from recurring. Id. Disciplinary action against the offending employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct. Id.

The record reflects that as soon as management was notified of the incident, Complainant's claim was investigated. Specifically, management obtained from Complainant a statement regarding the incident on the day it occurred, December 15, 2019. Report of Investigation (ROI) at 153. C1 was asked for a statement regarding the incident on his next scheduled workday, December 19, 2019. ROI at 155. S1's Affidavit Attached to Agency's Motion. Management initially interviewed C1 regarding the incident set forth in claim (1) on December 22, 2019. ROI at 131. In addition, S1 asserts that he reassigned C1 to work in another area on the opposite side of the facility on December 19, 2019. S1's Affidavit Attached to Agency's Motion. We acknowledge that in her affidavit, Complainant asserted that another manager assigned her at some point to work next to C1. We determine, however, that the AJ properly noted that Complainant did not allege that any additional unwelcome conduct occurred. In addition, the record reflects that Complainant was only at the facility a short period of time after the December 15, 2019 incident because she was a seasonal employee who was separated on January 3, 2020 due to lack of work, along with all the other seasonal employees who started work in November 2019. S1's Aff. Attached to Agency's Motion, ROI at 123. The record further reflects that on February 14, 2020, C1 was issued a 14-Day Suspension related to the incident in question. ROI at 139. Moreover, S1, in his affidavit attached to the Agency's Motion, asserts that C1 has not returned to work since February 27, 2020 and submitted his resignation on September 30, 2020. Based on the foregoing, we find that the Agency is not liable for the harassment because it took immediate and appropriate corrective action with respect to Complainant's allegation of sexual harassment by C1.

Claim (2) and (3)

We find that the AJ properly found that the incidents alleged in claims (2) and (3) are not sufficiently severe or pervasive to constitute harassment. Regarding claim (2), Complainant alleged that a supervisor on two dates made comments such as certain cultures do not like to be

touched and do not get too close (to Complainant).⁴ In addition, Complainant asserts that she was instructed not to speak to a senior level manager regarding the incidents at issue (claim (3)). S1, in his affidavit attached to the Agency's Motion, asserts that he told Complainant to speak to his immediate supervisor first and that if she was not satisfied, she should then ask to speak the senior manager. When viewing these incidents in conjunction with the Agency's prompt investigation of Complainant's sexual harassment claim and issuing corrective action (14-Day Suspension) to C1 as discussed above, we find that the alleged incidents are not sufficiently severe or pervasive to set forth an actionable claim of harassment. In addition, we do not find these alleged incidents are reasonably likely to deter Complainant or others from engaging in protected activity.

CONCLUSION

Accordingly, we AFFIRM the Agency's final order implementing the AJ's decision by summary judgment finding no discrimination.

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>

⁴ The supervisor at issue denies, in her affidavit, that she made these comments. ROI at 81.

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 13, 2022
Date