



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Shelby R.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 2020005406

Hearing No. 440-2017-00080X

Agency No. HS-TSA-00187-20

DECISION

On September 23, 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 August 4, 2020,² final order concerning 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. For the following reasons, we MODIFY the Agency's final order, in part, and REMAND the complaint for further processing.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Transportation Security Officer (TSO), SV-1802, at the Sloulin Field International Airport (ISN) in Williston, North Dakota. He joined the Agency on May 25, 2016, subject to a two-year trial period. Complainant was directly supervised by the Supervisory Transportation Security Officer (Supervisor), who, in turn, was supervised by the Transportation Security Manager (Manager). The Assistant Federal Security Director for Screening (Assistant Director) supervised the Manager and served as Complainant's third level supervisor.

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 Agency served its August 4, 2020, final order on August 25, 2020.

On February 10, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of national origin (Honduras) and reprisal for prior protected EEO activity under Title VII when:

1. In July 2016, management denied Complainant's request to work additional hours;
2. From July 2016 to October 6, 2016, management delayed Complainant's training and certification to screen individuals-with-disabilities (IWD), and told Complainant that other officers had priority over him to receive on-the-job-training (OJT) for IWD certification;
3. On August 15, 2016, management issued Complainant a Letter of Counseling (LOC) for failing to follow procedures;³
4. On or around September 1, 2016, management made fun of Complainant's accent when management joked that Complainant stated "panties" instead of "pants";
5. On September 11, 2016, management issued Complainant a LOC for violations which had not been discussed with Complainant and had occurred in July 2016 and August 2016;
6. On October 9, 2016, management told Complainant that he needed to work on his English;
7. On October 9, 2016, management directed Complainant to go home 1.5 hours before his shift ended;
8. On October 19, 2016, management issued Complainant a LOC for violating Standard Operating Procedures (SOP) though Complainant followed the orders of management;
9. On October 20, 2016, management told Complainant that if any of his accusations against management were untrue, he would be terminated;
10. On November 22, 2016, management removed Complainant from employment by letter dated November 8, 2016; and
11. On November 22, 2016, Complainant became aware by termination letter that he was accused of workplace violence on or about November 13, 2016.

³ Complainant withdrew claim 3. See Complainant's Appellate Brief at fn. 5.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing; however, on April 23, 2018, the Agency filed a motion for a decision.

Complainant subsequently filed an opposition to the Agency's motion. In his opposition, Complainant argued that there were sufficient genuine issues of material fact in dispute to preclude the issuance of a decision without a hearing, and that he could in fact establish a prima facie case of discrimination. Complainant contended that "[t]runcation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives [him] of a full and fair investigation of [his] claims."

Over Complainant's objections, the AJ assigned to the case granted the Agency's April 23, 2018, motion for a decision without a hearing and issued a decision without a hearing on July 2, 2020. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant initially argues that his case "was not properly dismissed because the AJ analyzed [his] claim of reprisal under the improper legal standard." In relevant part, Complainant reiterates that the Agency subjected him to reprisal when management told him that "he would be terminated if his accusations regarding discrimination by supervisors were proven to be untrue." As for the merits of his case, Complainant contends that the AJ should not have issued a decision without a hearing "because issues of material fact and credibility remain unaddressed."

The Agency opposes the appeal, and requests that the Commission affirm its final order. In so arguing, the Agency maintains that the AJ did, in fact, apply the proper legal standard for reprisal. The Agency, in relevant part, also emphasizes that "[t]here was no retaliation per se with respect to issue 9" because Complainant had "levied serious allegations against management, and the Assistant Director truthfully informed Complainant that under Agency policy, "false, defamatory, and disparaging statements" could result in discipline. Finally, the Agency disputes the purported credibility issues that Complainant raises on appeal and reiterates that there are no genuine issues of material fact in dispute to warrant a hearing.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986); *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review..."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (as revised, August 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

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

Claims 1-2, 4-8, and 10-11

With regard to claims 1-2, 4-8, and 10-11, we find that the AJ correctly determined, using the proper legal standard, that the preponderant evidence failed to establish that Complainant was subjected to discrimination as alleged. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor.

Claim 9

For claim 9, however, we find that the Agency subjected Complainant to discrimination on the basis of reprisal when, on October 20, 2016, management told Complainant that if any of his accusations against management were untrue, he would be terminated.

As a general matter, the statutory anti-retaliation provisions prohibit any adverse treatment that is sufficient to dissuade a "reasonable person" from making or supporting a charge of discrimination. See Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016). Although petty slights and trivial annoyances are not actionable, adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable. Id.

Given the importance of maintaining "unfettered access to [the] statutory remedial mechanisms" in the anti-retaliation provisions, we have found a broad range of actions to be retaliatory. For example, we have held that a supervisor threatening an employee by saying, "What goes around, comes around" when discussing an EEO complaint constitutes reprisal. Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), req. for recons. den., EEOC Request No. 0520090654 (Dec. 16, 2010).

Actions, such as warning a complainant not to make false accusations or risk disciplinary action may also amount to retaliation on its face. See Manuel R. v. Dep't of Agric., EEOC Appeal No. 0120142958 (Dec. 2, 2016) (declining to find retaliation where, after a hearing, the record failed to show that the named responsible management official warned complainant not to make false allegations or risk losing his job).

In the instant case, the record shows that Complainant met with the Manager and Assistant Director to discuss his concerns about the Supervisor. During the EEO investigation, Complainant stated that he told the Assistant Director that he had “asked [the Supervisor] for additional hours, and [the Supervisor] discriminated against [him] by giving the hours to a Caucasian employee.” ROI at 85. Complainant also claimed that he told the Assistant Director that the Supervisor had commented on his English and issued him LOCs for reporting misconduct and discrimination. Id. Complainant asserted that the Assistant Director responded by warning Complainant that “if anything [he] said was untrue, [he] would be terminated from [the Agency].” Id. It is undisputed that the Assistant Director warned Complainant that he risked termination if his accusations turned out to be untrue. Specifically, the Assistant Director admitted to stating the following:

I explained to [Complainant] that during our discussion he has made some very serious accusation[s] towards the ISN LTSO, [Supervisor], [Manager] and the ND training department and that we take these issues seriously. I explained that some of his accusations, if found to be correct, could possibly result in these individuals losing their jobs and conversely if it were proven that his claims were false it may cost him his job as well.

Id. at 146.

While we certainly understand both the Assistant Director concerns and the Agency's arguments on appeal, we nevertheless find the underlying warning in claim 9 to be retaliatory. We have long held that the truth or falsity of a complainant's allegations goes to the merits of the complaint and is irrelevant as to whether he or she can bring a claim of discrimination. See Zhang v. U.S. Postal Serv., EEOC Appeal No. 01982202 (Apr. 28, 1999). We are particularly concerned that the broad warning made by the Assistant Director could dissuade a reasonable person from engaging in protected EEO activity for fear that an unsuccessful EEO complaint could result in disciplinary action. That was the issue of concern in Manuel R., supra. While the complainant in that case was unable to prove that the accused management official uttered the alleged warning, there is no such dispute here. We, therefore, conclude that the Agency subjected Complainant to unlawful retaliation as alleged.⁴

⁴ Complainant may be entitled to compensatory damages to the extent that he is able to show a compensable harm as a result of the retaliatory incident. Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009) citing Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998) (a finding of retaliation on its face does not automatically entitle a complainant to a damages award).

CONCLUSION

We AFFIRM the Agency's final order on claims 1-2, 4-8, and 10-11. However, on claim 9, we REVERSE the Agency's finding of no discrimination and REMAND the claim to the Agency for further processing. The Agency shall comply with the relief in the following Order.

ORDER

The Agency shall take the following actions:

1. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall complete a supplemental investigation concerning Complainant's entitlement to compensatory damages and determine the amount of compensatory damages due Complainant in a final decision with appeal rights to the Commission. The Agency shall pay this amount to Complainant within **thirty (30) calendar days** of the date of the determination of the amount of compensatory damages. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to Complainant for the undisputed amount. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
2. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall provide eight hours of interactive EEO training to the Assistant Director.⁵ The required training shall address management's responsibilities with regard to eliminating discrimination and reprisal in the workplace.
3. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall consider taking disciplinary action against the Assistant Director. The Commission does not consider training to be a disciplinary action. The Agency shall report its decision to the Commission and specify what, if any, action was taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline.
4. The Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

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

⁵ The Assistant Director is identified on page 140 of the ROI.

POSTING ORDER (G0617)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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

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

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

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

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

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

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

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

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

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

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


COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

March 28, 2022
Date