



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

[REDACTED]
Clarine L.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2020004971

Hearing No. 451-2014-00051X

Agency No. BOP-2013-0549

DECISION

On September 3, 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, final order concerning her 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, the Commission VACATES the Agency's final order.

BACKGROUND

During the relevant time, Complainant worked as a Human Resources Manager at the Agency's Federal Correctional Institution Three Rivers in San Antonio, Texas. Believing that she was subjected to unlawful discrimination, Complainant contacted an EEO Counselor. Informal efforts to resolve Complainant's concerns were unsuccessful. Subsequently, on May 20, 2013, she filed a formal EEO complaint alleging that the Agency subjected her to discrimination, sexual harassment, and a hostile work environment based on race (African American), sex (female), and in reprisal for prior protected EEO activity 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.

1. On April 9, 2013, Complainant was charged with 80 hours of Absence Without Leave (AWOL);
2. On April 19, 2013, she received an incomplete performance evaluation, and her supervisor refused to discuss her performance progress; and
3. Between October 2012 and April 2013, her supervisor subjected her to sexual and nonsexual harassment in the form of repeated sexual advances, requests for favors, and unwanted comments.

At the conclusion of the investigation, Complainant was provided a copy of the investigative file and requested a hearing before an EEOC Administrative Judge (AJ). On May 21, 2014, the Agency filed a motion for a decision without a hearing. The AJ granted the motion for summary judgment and, on June 29, 2020, issued a decision finding no discrimination.

The AJ concluded that, with regard to claims 1 and 2, the Agency offered a legitimate, nondiscriminatory reason for their actions and that Complainant did not offer evidence of pretext in either claim. With respect to claim 3, the AJ concluded that the incidents in question did not rise to the level of sexual harassment.

In her claim of sexual harassment, claim 3, Complainant noted that she and Assistant Warden (AW) engaged in small talk beginning August 2012. But in October 2012, Complainant said that AW came into her office and said he wanted to talk to her about something “totally personal.” Record of Investigation (ROI) at 80. She asserted that she told AW that she was going to take off her nametag since it was personal, and AW replied, “Oh, don’t worry about it, I’m the boss, and I said okay,” but she responded that that did not “seem right.” ROI at 81.

According to Complainant, AW proceeded to tell her, “Cut to the chase, you need a man.” ROI at 81. Complainant asserted that her initial reaction was, “Sir, I don’t need you to come in my office and tell me when I need a man.” ROI at 81. He purportedly reiterated, “[Y]ou need a man and it’s showing.” She recounted that AW recommended that she go to a “real nice club” with jazz music; doctors and big wigs went there. She said that she responded that she didn’t go to bars and asked if the club played gospel music. ROI at 82. He reportedly told her to go on a Friday night, find a “nice, sexy dress,” and show up at the bar because “you never know who might walk up in there.” ROI at 82. Complainant asserted that she told AW that she was not interested in going to the club, but he replied, “Well you never know, even some of your coworkers might be there and you can socialize with them...but just remember what I told you, you actually need to have on a sexy black dress and you will find you a man.” ROI at 84. Complainant felt like she had to go to the bar, she noted, because AW would “hold her feet to the fire” about it. ROI at 84. AW also reportedly told her, “I’m giving you a mentoring session right now, but this is non-Agency mentoring, this is [an] AW to Complainant mentoring session.” ROI at 83. She said that his behavior embarrassed her. ROI at 80.

Approximately a week later, stated Complainant, AW texted her, twice, and asked her whether she had gone to the bar. ROI at 86. She reported that she did not respond to the first text and responded to the second with “huh.” ROI at 87. In reply, Complainant explained, AW asked her to call him on a different telephone number. ROI at 87. The following workday, AW asked Complainant if she had received his texts and, noted Complainant, when she said his texts were received too late, he replied, “so you just wasn’t planning to call me, huh?” ROI at 87. AW continued to ask her if she was going to the bar, asserted Complainant. ROI at 94.

Additionally, Complainant stated that AW commented on her appearance and dress. She said he regularly commented, “...that’s a nice suit, but you know, I dress better, I’m the boss.” ROI at 94-5. She reported that on several occasions he advised her to reach out to a prior manager “and getting, you know, my hair done pretty and my nails done...she can give you lots of pointers on what it takes to please me.” ROI at 111.

Complainant stated that AW also made inappropriate comments in regard to professional situations. She said that AW asked to her participate in Labor Management Relations (LMR). He reportedly was aware that she did not want to attend the meetings, but AW nevertheless allegedly instructed her, “you are going to sit right there beside me and you are not going to say a word, I just want you to sit there besides me and just smile.” ROI at 92.

Complainant explained that she incurred government debt when she moved for the position. ROI at 101. In discussing the debt, Complainant alleged that AW told her if she had a man, the debt would already be paid for. ROI at 101.

AW generally denied making many of the statements and to those comments he acknowledged making, he professed a legitimate motive. Specifically, AW rejected ever saying that Complainant needed a man, should go to a bar, or should wear a sexy black dress. ROI at 281, 291. He denied texting Complainant or asking her to call him. ROI at 292. As for the remark about dressing to please him, AW claimed he did not make the statement but merely encouraged her to reach out to the former manager to find the best local salons since she was new to the area. ROI at 312. AW explained that, due to the banter between Complainant and the Union President, he requested that LMR communication go through him first. ROI at 294-95. Regarding Complainant’s debt, AW stated he was required to discuss it with her and disputed saying that if she had a man it would have been paid off. ROI at 299.

Following the AJ’s June 29, 2020 decision, finding no discrimination, the Agency issued a final action implementing the decision. The instant appeal followed. Neither party provided a brief or arguments on appeal.

STANDARD OF REVIEW

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 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 FINDINGS

We must determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. 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.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment “where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition.” Anderson, 477 U.S. at 250.

In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an AJ could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrenner, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." Pedersen v. Dep't of Justice, EEOC Request No. 05940339 (February 24, 1995).

After a careful review of the record, we find that the AJ erred when she concluded that there was no genuine issue of material fact in this case. In finding no hostile work environment, the AJ acknowledged that the statements AW allegedly made were "highly inappropriate" but determined that the incidents did not rise to the level of sexual harassment. Specifically, the AJ noted, for context, there was evidence that AW and Complainant had a good relationship, and that AW was her mentor. Further, the AJ reasoned that "although [AW] suggested she go to Drew's, he did not meet her there, or otherwise seek to meet her alone, outside of the workplace leading me to conclude that, however misguided, he believed he was offering a suggestion that would improve her social life." With respect to the comment, that if she had a man her debt would be paid, AJ concluded it did not rise to the level of unlawful sexual harassment, noting that there was "no credible evidence that [AW] ever suggested that he should be that man."

The instant record contains no evidence as to the credibility, or lack thereof, of either party concerning the events giving rise to the sexual harassment claim or whether some of the alleged statements were even made. This case can only be resolved by weighing conflicting evidence and assessing the credibility of Complainant and AW as well as hearing testimony of other relevant witnesses. In the absence of a hearing, this case becomes a "trial by affidavit" as to an issue involving a disputed material fact. Redmand, 516 F.2d at 768.

As noted above, in granting summary judgment one must believe the evidence of the non-moving party (in this case, Complainant), and all justifiable inferences must be drawn in her favor. Here, however, the AJ made unsupported inferences regarding AW's motivations for his comments. Specifically, AJ reasoned that AW made statements concerning Complainant needing a man, going to a bar, and wearing a sexy black dress for the sole purpose of improving Complainant's social life. AW not only did not proffer the rationale stated by the AJ, but simply denied making the alleged statements. Moreover, we do not find the AJ's statement, that AW did not state that he, in particular, was the man that Complainant needed, to be persuasive evidence that AW's comments were not harassment based on sex. To establish a claim of harassment, Complainant must only show that: (1) she is a member of a statutorily protected class; (2) she was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the protected class; (4) the harassment had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the

employer. Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998); 29 C.F.R. § 1604.11. With respect to element (5), an agency is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee, which is the case here. See Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

We note that the hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have “a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses.” See EEO MD-110 at Chap.7, §1; see also 29 C.F.R. § 1614.109(e). “Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims.” Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (Mar. 26, 1998); See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (Oct. 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (Apr. 25, 1995). In summary, there are simply too many unresolved issues which require additional testimony and an assessment as to the credibility of the management officials, witnesses, and Complainant. Therefore, judgment as a matter of law for the Agency should not have been granted. The case shall be remanded for a hearing.²

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the Agency's final order and we REMAND this matter in accordance with the Order below.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the San Antonio Field Office Hearings Unit. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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

² As the Commission is remanding the entire complaint, we shall not address claims 1 and 2 in this decision.

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)

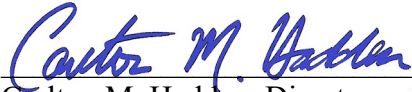
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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

May 2, 2022

Date