



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

[REDACTED]
Neal O.,¹
Complainant,

v.

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

Appeal No. 2021002681

Agency No. 4V-412-0006-20

DECISION

On January 4, 2021, 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 March 3, 2021 final decision 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.

BACKGROUND

During the period at issue, Complainant worked as a Storekeeper, Auto Parts, at the Agency's Vehicle Maintenance Facility (VMF) facility in Fort Myers, Florida. Complainant had been an Agency employee for approximately 26 years.

In April 2020, the Agency placed Complainant under his present Supervisor. On May 29, 2020, Complainant's Supervisor issued a letter of warning for failure follow instructions from Supervisor. On June 23, 2020, Complainant received notice of removal (effective June 28, 2020) for improper conduct.

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.

On August 4, 2020, Complainant filed a formal EEO complaint. Therein, Complainant claimed that the Agency unlawfully retaliated against him for prior protected EEO activity when:

1. On May 29, 2020, Complainant was issued a Letter of Warning;
2. On May 6, 2020, Complainant's Supervisor verbally threatened him and yelled at him, including using profanity, and subsequently, management refused Complainant's requests that a Threat Assessment be conducted; and
3. On June 5, 2020, Complainant was put on Emergency Placement in an Off-Duty Status, and on or about June 23, 2020, Complainant was issued a Notice of Removal.

On August 24, 2020, pursuant to 29 C.F.R. § 1614.107(a)(1), Claim 1 was dismissed for stating a claim that was pending or has been decided by the Agency or Commission. In a pre-arbitration settlement, the Agency vacated the letter of warning from Claim 1. Complainant neither contested nor appealed the Agency's dismissal of Claim 1.

In an arbitration hearing held on December 1, 2020, Complainant raised the same claims. The Arbitrator determined that Complainant lacked definitive proof that the Agency retaliated against him based on his work as a union steward. However, the Arbitrator ordered the emergency placement off-work rescinded because the evidence did not establish that Complainant posed an immediate threat. In addition, the arbitrator reduced the removal to a suspension. As a result of the arbitration decision, Complainant returned to work at the VMF in January 2021. The Agency provided Complainant with a backpay award for the emergency placement from June 5, 2020 (the first date of the emergency placement) through June 23, 2020 (the day he was issued the removal/suspension). Therefore, Complainant did not receive backpay from June 24, 2020 through his return to work in January 2021, a period of approximately seven months.

After an investigation of the EEO complaint, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before EEOC Administrative Judge (AJ). Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f). On March 3, 2021, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b), finding no discrimination.

The instant appeal followed. On appeal, Complainant concedes he successfully raised and resolved the issue of his emergency placement off-work and was eventually returned to employment through the Agency's negotiated grievance process. However, Complainant argues his EEO complaint has not been rendered moot because he is still entitled to seven months of lost wages as a result of being the wrongful removal action. Complainant further argues that additional compensation was warranted for anxiety, depression and post-traumatic stress syndrome that Complainant has suffered as a result of the management's mistreatment. Complainant accuses the Agency of overreacting and exaggerating the physical contact that allegedly occurred between Complainant and his supervisor.

ANALYSIS AND FINDINGS

As an initial matter, EEOC Regulation 29 C.F.R. § 1614.301(a) states that when a person is employed by an agency subject to 5 U.S.C. § 7121(d) and is covered by a collective bargaining agreement (CBA) that permits claims of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or grievance on matter of alleged employment discrimination must elect to raise the matter under either the 29 CFR Part 1614 EEO complaint process or the negotiated grievance procedure, but not both. 29 C.F.R. § 1614.107(a)(4) provides that an EEO complaint may be dismissed where the complainant first elected to raise the matter in a negotiated grievance procedure that permits allegations of discrimination. Postal employees are exempt from the 5 U.S.C.A. § 7121 restriction that complainants must elect between filing an EEO complaint or filing a grievance on matters of alleged employment discrimination. Consistently, this Commission has held that postal employees “have dual filing rights and may pursue allegations of discrimination under both the negotiated grievance procedure and the EEO process.” Fleming v. U.S. Postal Serv., EEOC Appeal No. 01995717 (Aug. 2, 2000); Stewart v. U.S. Postal Serv., EEOC Appeal No. 01A61042 (May 12, 2006).

To prevail in his EEO complaint, Complainant must satisfy the three-part evidentiary scheme from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must first establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. See Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978). As already noted, the Agency itself in its FAD has already conceded that Complainant established a prima facie case of unlawful retaliation for prior EEO activity. The second burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502 (1993). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency’s explanation is a pretext to mask prohibited motives. See Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133 (2000).

Here, Complainant is alleging unlawful retaliation for engaging in prior EEO activity. It is undisputed that Complainant had filed 12 prior EEO complaints between 2016 and 2020 (including complaints identified as Agency Nos. 4V-412-0002-16; 4V-412-0003-16; 4V-412-0009-17; 4V-412-003-18; 4V-412-0001-19; 4V-412-0002-19; 4V412-0007- 19; and 4V-412-0001-20). Complainant had also raised an allegation of harassment by the Supervisor with management shortly before the events at issue. Involved management was aware of Complainant’s protected activity. The Agency, in its own final decision, specifically found that Complainant “has satisfied temporal proximity and a causal link has been proven, and the complainant has . . . made a prima facie retaliation claim.” Agency FAD at p. 12.

Regarding the reasons proffered for initially placing Complainant off-work and then issuing the notice of removal, Agency management witnesses asserted Complainant had physically assaulted his supervisor and therefore merited removal from the workplace. The June 24, 2020 Notice of Removal stated:

On June 2, 2020, [Complainant] exhibited improper conduct when [he] physically assaulted [his] supervisor. Supervisor [named] was standing on the sidewalk between the battery room and the parts storage speaking to technician [named]. [Complainant] came out of the door by the manager's office and, as [he] walked behind [Supervisor], [Complainant] hit him in the back twice to shove him out of the way. [Complainant] then walked into the parts storage room and laughed.

Technician [named] corroborated the incident, and stated [Complainant] initiated physical contact and did not ask [Supervisor] to move before [he] shoved him.

Regarding pretext, we determine the Agency's stated reason for issuing Complainant the notice of removal is, among other things, undermined by significant inconsistencies in record testimony as well as comparator information suggesting disparate treatment.

Agency management had a threat assessment team look into the alleged assault by Complainant. Significantly, the June 10, 2020 threat assessment team report indicates that the Agency's key witness (the technician) stated that he was talking to Complainant's Supervisor when he saw him "stumble forward as [Complainant] went by." He is also reported as saying, "he did not know if [Supervisor] had been hit or shoved."² Complainant denied touching the Supervisor, but stated that if he made any physical contact with the Supervisor during this incident it was unintentional. We note the threat assessment report made no affirmative findings resolving whether or not Complainant committed an assault and did not make any recommendations for disciplinary action. The record also contains several June 18, 2020 emails from the Agency's Labor Relations unit indicating that Labor Relations did not recommend proceeding with a removal because of the lack of evidence against Complainant.

We further note that the alleged physical assault occurred on June 2, 2020, but no action was taken until three days later, on June 5, 2020. Because Complainant was permitted to work for three days after the alleged assault, it was unlikely that there was a concern by management about Complainant posing a danger to the Supervisor or anyone. This was, in fact, the reason the arbitrator found inadequate support for putting Complainant off-work on the emergency placement.

Finally, the record reflects reports concerning other incidents of physical confrontations at the Ft. Myers VMF involving six other employees. In those instances, the comparator employees were issued letters of warning as opposed to removal. Therefore, there is little support for the assertion that removal for what happened here was standard practice at the facility.

² We also note that Complainant has produced some evidence to suggest that the technician was not present in the workplace where he could have witnessed this event. The threat assessment report noted that the technician, who was not a union member, made strong statements against the union (Complainant was a union official).

In sum, the evidence simply does not support a finding, even accepting the version of events were Complainant may have pushed the Supervisor on the back to get by, that Complainant's actions were sufficiently serious to warrant more than the letter of warning imposed on other employees who engaged in similar misconduct. As such, we conclude that Complainant has established, by a preponderance of the evidence, that the proffered reasons for his removal were a pretext masking retaliatory animus towards Complainant. This retaliatory motivation resulted, at least in part, in the decision to issue the severest form of disciplinary action – a removal.

CONCLUSION

Therefore, after a careful review of the record, the Agency's final action regarding the removal decision is REVERSED and the matter is REMANDED to the Agency for further processing in accordance with this decision and the Order below.

ORDER

No later than one-hundred and twenty (120) calendar days after the date this decision is issued, the Agency is ordered to take the following remedial actions:

1. Unless it has already done so, the Agency shall determine and pay Complainant the appropriate amount of back pay, with interest, and other benefits, pursuant to 29 C.F.R. § 1614.501, from June 24, 2020 through the date in January 2021 when Complainant returned to work. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the 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. The Agency shall conduct a supplemental investigation on compensatory damages and provide Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages regarding incidents. For guidance on what evidence is necessary to prove pecuniary and non-pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991 (July 14, 1992) (available at eeoc.gov.) The Agency shall complete the investigation and issue a FAD appealable the EEOC determining the appropriate amount of damages.
3. The Agency shall train both the individual identified herein as Complainant's Supervisor and the individual identified herein as the Fort Myers VMF Manager on how to identify and prevent retaliation discrimination under Title VII, even if they have previously received such training.

4. The Agency shall consider taking disciplinary action against Complainant's Supervisor and against the Fort Myers VMF Manager. 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.

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 of the Agency's calculation of back pay and other benefits.

POSTING ORDER (G0617)

The Agency is ordered to post at its Fort Myers Vehicle Maintenance Facility (VMF) 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).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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

June 13, 2022

Date