



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

[REDACTED]
Mellissa F.,¹
Complainant,

v.

Marcia L. Fudge,
Secretary,
Department of Housing and Urban Development,
Agency.

Appeal No. 2021003459

Hearing No. 570-2020-00316X

Agency No. HUD-00148-2018

DECISION

On May 29, 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 April 29, 2021 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

At the time of events giving rise to this complaint, Complainant worked as a Director, Office of Housing, Financing and Budget, GS-15, at the Agency's FHA Commissioner Office of Housing, Finance and Budget in Washington, D.C. On August 23, 2018, Complainant contacted an EEO Counselor. Informal efforts to resolve her concerns were unsuccessful. Subsequently, on October 19, 2018, Complainant filed a formal EEO complaint alleging that the Agency subjected her to discrimination, sexual harassment, and a hostile work environment on the bases of sex (female) and 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. In April 2018, the Acting Associate General Deputy Assistant Secretary (AAGDAS) told her she would have to perform a sexual act the next time he gave her a ride to her car;
2. On April 18, 2018, a cross-like symbol was drawn on her door with an oil-like substance;
3. On April 26, 2018, she was moved to an office away from her staff;
4. In May and July 2018, the AAGDAS made disparaging remarks about her performance to senior management and other staff;
5. From May 16, 2018 through September 25, 2018, she was excluded from meetings concerning processes and assignments within her program office;
6. On or about July 18, 2018, she learned that the AAGDAS spoke of her EEO activity to other staff and stated “[Complainant was] not afraid to sue HUD;”
7. On October 1, 2018, the AAGDAS incited an employee to make an EEO allegation against her;
8. On October 9, 2018, she was instructed not to email her second-line manager [the AAGDAS] regarding her assignments or work conditions; and
9. On March 18, 2019, she was detailed to the Philadelphia Homeownership Center.

With respect to the sexual harassment claim in incident 1, Complainant asserted that the AAGDAS has subjected her to “repeated sexual advances and inappropriate comments” that eventually culminated in the specific incident in April 2018. See Report of Investigation (ROI) at 2. She explained that after the AAGDAS was appointed her second-level supervisor, the sexual harassment increased. See ROI at 3. In early April 2018, after a late work meeting, he offered to give Complainant a ride back to her car. See id. While in the car, Complainant stated that the AAGDAS explained that after having done a favor for another Agency employee, the employee had offered to perform oral sex on the AAGDAS, which the AAGDAS declined. See id. But, the AAGDAS proceeded to tell Complainant that she would need to perform oral sex the next time he gave her a ride home. See id.

Complainant reported the car incident and other allegations of sexual harassment. In response, the Agency conducted a Management Inquiry into the sexual harassment and reprisal claims. The Management Inquiry noted that Complainant also alleged that on more than one occasion, the AAGDAS asked Complainant “when are we going to have sex?”. See Agency’s Motion for Summary Judgment, Ex. F.

In contrast, the AAGDAS denied making any inappropriate remarks to Complainant and asserted that it was Complainant who made an inappropriate remark about the AAGDAS's friendship with the Agency employee. See Agency's Motion for Summary Judgment, Ex. F. The Management Inquiry concluded that, in light of the disputed account of events and absence of supporting evidence, it could not determine that the AAGDAS sexually harassed Complainant. See Agency's Motion for Summary Judgment, Ex. F.

At the conclusion of the investigation into her EEO complaint, Complainant was provided a copy of the investigative file and requested a hearing before an EEOC Administrative Judge (AJ). On April 21, 2021, the AJ issued a decision without a hearing finding no discrimination.

The AJ concluded that, to the extent the incidents constituted discrete acts of discrimination, Complainant did not offer evidence of pretext or any evidence to link her sex or protected activity to the Agency's actions. Further, the AJ found that the incidents in question, individually or collectively, were not sufficiently severe or pervasive to state a claim of harassment.

The Agency's final action implemented the AJ's decision finding no discrimination. Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the AJ erroneously granted the Agency's motion for summary judgment. She maintains that the record establishes that the AAGDAS subjected her to a continuing and ongoing campaign of sexual harassment, that began when the AAGDAS first met Complainant ten years ago and culminated in the car incident. Thereafter, asserts Complainant, the AAGDAS has subjected her to retaliation.

The Agency did not file a response in opposition to Complainant's 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 first 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 he concluded that the record was adequately developed. Specifically, we note that the EEO investigation into the instant complaint only inquired into a single incident of sexual harassment, the car incident in April 2018. However, the record is clear that Complainant was alleging numerous instances of sexual harassment that culminated in the April 2018 incident. In Complainant's formal complaint, she specifically stated that the AAGDAS had subjected her to "repeated sexual advances and inappropriate comments." See ROI at 2. In her deposition, Complainant further explained that, when she first met the AAGDAS, she saw him on the train, and he told her that he had bet a male co-worker that he could sleep with Complainant. See Agency's Motion for Summary Judgment, Ex. E at 31. Thereafter, she stated that when she saw the AAGDAS in the hallway, he would shake her hand and tickle her palm, which she later realized was an indication of the AAGDAS's sexual interest in her. See Agency's Motion for Summary Judgment, Ex. 3 at 32. She stated that the AAGDAS would come by her office, unexpectedly, and make sexual comments, such as "if we had sex, I would bust you in half." See Agency's Motion for Summary Judgment, Ex. E at 33. Complainant also filed an interrogatory in response to the Agency's discovery request, further noting that the AAGDAS had made other comments such as "I want you to wrap your legs around my neck," and "Can I have some of that?" while looking at Complainant's breasts and private parts. See Complainant's Opposition to Agency's Motion for Summary Judgment, Ex. 4, Complainant's Response to Interrogatory 16. We find that the investigation failed to adequately inquire into the other incidents comprising Complainant's sexual harassment allegation and, therefore, the record is not sufficiently developed.

Further, we find that the AJ erred in concluding that there are no genuine issues of material fact in this case. In finding no hostile work environment, the AJ determined that the incidents were not sufficiently severe or pervasive to state a claim for harassment. As noted earlier, however, the record was not adequately developed concerning the other incidents of Complainant's sexual harassment claim. Moreover, contrary to the AJ's determination that Complainant did not provide evidence to link any of the alleged incidents to a protected class, verbal sexual advances can constitute an actionable claim of a hostile work environment based on sex. See Wild v. Dep't of Defense, EEOC Appeal No. 05A10058 (March 16, 2001). Additionally, the AJ failed to consider that the reprisal claimed in this case is not based solely on protected activity, but upon Complainant's rejection of the AAGDAS' ongoing sexual advances. We further note that a factfinder could conclude that the single incident in the car was sufficiently severe to create a hostile work environment. See Lans v. Social Sec'y Admin., EEOC Appeal No. 019800670 (Aug. 28, 2000) (noting that a single incident could be sufficient to create a hostile work environment where the single incident is sexual in nature).

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 made. This case can only be resolved by weighing conflicting evidence and assessing the credibility of Complainant and the AAGDAS, as well as the testimony from any 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, and all justiciable inferences must be drawn in her favor. Here, the AJ does not appear to have considered all the evidence in the light most favorable to Complainant, specifically by considering the entirety of the record concerning the numerous other allegations of inappropriate remarks made by the AAGDAS to Complainant.

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 Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 7-1 (Aug. 5, 2015); 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 (March 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (October 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995). In summary, there are simply too many unresolved issues which require an assessment as to the credibility of Complainant, the AAGDAS, and any other witnesses. 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

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission VACATES the Agency's final order and REMANDS the matter to the Agency in accordance with this decision and 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 Washington 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

² As the Commission is remanding the entire complaint, we shall not address the other alleged incidents of harassment in this decision.

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 8, 2022

Date