



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

[REDACTED]
James T.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Request No. 2022002209

Appeal No. 2021001460

Agency No. 19-40080-04411

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2021001460 (February 22, 2022). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c). For the following reasons, we DENY the Agency's request.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Boiler Operator, WG-5405-10, at the Naval Facilities Engineering Command Washington (NAVFAC), Public Works Department (PWD), located at the Washington Naval Yard in Washington, D.C. During the relevant time, Complainant's first-level supervisor was the Utility Supervisor (Person A). Person B was a Work Leader, WL-11; and Person C was a Work Leader, WL-10. Person D was Complainant's second-level supervisor at the time.

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 19, 2019, Complainant initiated contact with an EEO Counselor. When the matter was not resolved, Complainant filed a formal EEO complaint on November 29, 2019, which was subsequently amended, alleging the following:

1. The Agency subjected him to disparate treatment based on race (African-American), sex (male), color (caramel brown), and in reprisal for prior protected EEO activity when Person A (Complainant's first-line supervisor; Utility Systems Supervisor) allegedly allowed unfair practices and disparate treatment by covering up for Caucasian employees, being racist, sleeping on duty, and only disciplining African-American employees when:
 - a. On August 31, 2019, Person A sent Complainant home for a half day for an unspecified misunderstanding;
 - b. On January 18, 2020, Complainant was directed to be reassigned from Navy Surface Warfare Center (NSWC) Carderock to Washington Navy Yard by Person A; and
 - c. On February 14, 2020, Complainant was denied eight hours of "other paid absence" for February 19, 2020, to work on his EEO complaint by Person A.
2. Complainant further alleged Person A subjected him to a hostile work environment (ongoing and continuous harassment) based on race, color, sex and in reprisal for protected EEO activity when, in addition to the incidents set forth in Claim 1:
 - a. From 2016 to present, offensive terms such as the "N-word"² and "Hook Nose" were used in the work environment on multiple occasions;
 - b. From January 23, 2016 to present, Complainant's coworker (Coworker 1) (Caucasian), has been allowed to be drunk on duty and, in January 2016, Complainant received threats from Coworker 1 while Coworker 1 was under the influence of alcohol and Person A never reported it or took action against Coworker 1;
 - c. On July 11, 2019, Complainant was forced to work overtime because Person A allowed Coworker 1 to walk out;
 - d. From November 14, 2019 to present, Person A did not intervene and allowed another of Complainant's coworkers, Coworker 2 (Caucasian), to harass Complainant, make racially disparaging comments concerning African Americans, and sleep on duty on more than one occasion;
 - e. On November 25, 2019, Person A would not allow Complainant official time during the workday to fill out his formal EEO paperwork for the instant complaint;

² References to the "N-word" and other slurs or bad language in this decision use the exact language as used by Complainant (and other persons) in their statements. Thus, the quotations reflect the words exactly as stated by Complainant (and other persons).

- f. On November 25, 2019, Person A emailed Complainant and stated, “You are not following your chain of command again. This is disrespectful behavior towards your command. Please refrain from this bad behavior. My office is always open to disgruntled employees;” and
- g. On February 14, 2020, Complainant was informed by Person A that he was not following his Chain of Command (COC) again, threatened that he would be subjected to disciplinary action, and instructed to stop harassing contractor, Coworker 3.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant’s request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. Complainant subsequently appealed the Agency’s final decision to the Commission, which the Commission docketed as Appeal No. 2021001460.

On February 22, 2022, we issued a decision on the merits of the appeal. In issuing the decision, the appellate decision initially addressed claim 1a, 1b, 1c, and 2e, concerning Complainant’s allegations that management unlawfully sent him home, transferred his duty station, and denied his requests for overtime. Having reviewed the record, we found no merit to these claims, as the record persuasively showed that the alleged incidents either did not occur or the Agency had legitimate, nondiscriminatory reasons for taking actions.

Next, we turned to Complainant’s hostile work environment claim. After reviewing claims 2a, 2b, 2c, 2d, 2f, and 2g, the Commission found, in relevant part, that the statements contained in the affidavits of Person A and Person B persuasively showed that one of Complainant’s coworkers (Coworker 1) referred to Complainant as the “N-word” behind his back. Additionally, the Commission found that the probative record showed that Coworker 2 made racially disparaging comments about African-Americans by telling Complainant, in front of person A, that “Black Educated Men is racist” and “the yuzu’s people, ‘blacks,’ are inferior to ‘White Men like me.’” Citing to Brooks³ and Yakubi⁴, the appellate decision found, in relevant part, that the alleged comments by Coworkers 1 and 2 were sufficiently severe or persuasive to alter the terms of the conditions of Complainant’s employment because the nature of the comments “dredged up the entire history of racial discrimination in this country.”

The appellate decision then addressed whether there was a basis for imputing liability to the Agency. Having reviewed the record, we acknowledged that the Agency had claimed that Coworker 1 and Coworker 2 “were disciplined promptly for their behavior related to at least some of the allegations at issue and no longer work” for the Agency; however, we found the record to be deficient as to whether “discipline was actually issued to either Coworker 1 or

³ Brooks and Dep’t of the Navy, EEOC Request No. 05950484 (June 25, 1996).

⁴ Yakubi v. Dep’t of the Army, EEOC Request No. 05920778 (Jan. 4, 1993).

Coworker 2 for the alleged behavior at issue in this case.” In reaching this conclusion, we noted that Complainant, in his rebuttal statement, claimed that Coworker 1 was still employed with the Agency and that he and Coworker 1 even worked together. The appellate decision ultimately concluded that the Agency was “liable for the racial/color harassment at issue because it failed show that it took immediate and appropriate corrective action.”

The Agency then filed the instant request for reconsideration. In requesting reconsideration, the Agency vehemently argues that the appellate decision involves clearly erroneous interpretations of material fact or law. In so arguing, the Agency initially contends that “[t]he Decision erroneously relied upon case law that establishes that the use of the N-word said directly to the complainant or within the complainant’s hearing, has been considered so severe as to establish a hostile work environment claim.” Citing to Watkins v. Department of Veterans Affairs, EEOC Appeal No. 01991145 (August 15, 2002), the Agency maintains that, while a limited number of highly offensive slurs or comments can constitute a hostile work environment, “Commission precedent clearly shows that a highly offensive racial epithet must be made directly to or in the presence of the Complainant for that alone to constitute a hostile working environment.” Here, however, the Agency asserts that Complainant never heard Coworker 1 refer to him as the N-word. The Agency argues that “[u]nlike the cases cited in the Decision, hearsay/rumored [] use of the N-word not made in Complainants [sic] presence, on their own, is not enough to establish a severe or pervasive hostile work environment.” Given that our decision in Michel H. v. Department of Housing and Urban Development, EEOC Appeal No. 2019005675 (September 2, 2020) found no discrimination, where the N-word was used outside of the complainant’s presence, the Agency maintains that the appellate decision failed to follow Commission precedent.

The Agency also argues that the appellate decision involved a clearly erroneous interpretation of material fact or law in finding harassment, in part, on Coworker 2’s statement that “Black Educated Men is racist” and “the yuzu’s people, ‘blacks,’ are inferior to ‘White Men like me.’” The Agency asserts that these comments are not sufficient to render the work environment hostile because 1) Coworker 2 allegedly made the comments approximately four years after Coworker 1 allegedly referred to Complainant as the N-word; and 2) the comments are nonsensical and incoherent; 3) they do not dredge up the entire history of racial discrimination in this country; and 4) they do not have purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment.

Next, the Agency argues that the appellate decision involves clearly erroneous interpretations of material fact or law in finding that the Agency did not discipline Coworker 1 and Coworker 2. The Agency maintains that, to the contrary, the record clearly showed that Person A disciplined Coworker 1, as Complainant himself admitted that Person A had told him that Coworker 1 had been “put on the St. for 5 day [sic] & had to complete a mandatory D&A program.”⁵

⁵ According to the Agency, “put on the st. (street)” is slang for a suspension. See Agency’s Appellate Brief at fn. 3. Additionally, the Agency clarifies that “D&A” means “drug and alcohol.” Id.

The Agency expresses dismay that the appellate decision seemingly suggests that because four years in 2020, Coworker 1 is still working Complainant, then that somehow means that discipline was not given for the alleged incident in January 2016. The Agency argues that “[t]his is a clearly erroneous interpretation of this fact because a reasonable interpretation of the fact would be that the discipline that was given back in 2016 clearly happened and was effective.” Furthermore, the Agency argues that the appellate decision failed to conduct a credibility analysis regarding Person A’s assertion that he did in fact discipline both Coworker 1 and Coworker 2 for making inappropriate comments about Complainant. The Agency contends that it is unreasonable to believe that Person A, an African American male, would not take reasonable disciplinary action against Coworker 1 and Coworker 2 based on the isolated incidents or tolerate a hostile work environment against African Americans.

Finally, the Agency argues that the appellate decision will have a substantial impact on its policies, practices, or operations, as the appellate decision appears to suggest that “the appropriate discipline for the alleged incident from January 2016 is removal from federal service.” To the contrary, the Agency emphasizes that “[t]s simply not the law that every employee must be removed from the Federal service for making a single racist statement or epithet, particularly one outside the presence of a complainant.”

Complainant opposes the Agency’s request for reconsideration and implores the Commission to deny the Agency’s request. In so arguing, Complainant emphasizes that the mere fact that Person A is African-American does not mean that Person A cannot discriminate against other African-Americans.⁶

After reviewing the appellate decision and the entire record, we find that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is our decision to DENY the request. While we are certainly mindful of the Agency’s contentions, we are nevertheless disinclined to agree with the Agency. Contrary to the Agency’s contention that a racially-charged comment made outside of a complainant’s presence cannot constitute harassment, we note that the Commission has, in the past, held otherwise. In Johnson v. Department of Homeland Security, EEOC Appeal No. 0120132831 (September 10, 2015), the Commission specifically addressed whether a racially-charged comment made outside of a complainant’s presence can constitute actionable harassment. There, the Commission expressly held that “merely because Complainant was not present when the derogatory comments were made” does not render the alleged comments to be irrelevant, as “second-hand evidence of discriminatory comments is relevant to whether a hostile work environment existed, because these comments can also impact the work environment.”

⁶ We decline to address Complainant’s July 22, 2022 brief, as our regulations do not generally allow for the submission of multiple briefs. See 29 C.F.R. § 1614.403(d); see also Rios-Ortega v. Dep’t of Def., EEOC Appeal No. 0120111979 (Nov. 5, 2012) (declining to address complainant’s subsequent briefs).

Given this clear precedent, we reject the Agency's contention that "Commission precedent clearly shows that a highly offensive racial epithet must be made directly to or in the presence of the Complainant for that alone to constitute a hostile working environment." In reaching this conclusion, we considered the Agency's citation to Watkins v. Department of Veterans Affairs, EEOC Appeal No. 01991145 (August 15, 2002) and Michel H. v. Department of Housing and Urban Development, EEOC Appeal No. 2019005675 (September 2, 2020); however, as the Commission's holding in Johnson is directly on point here, we decline to follow Watkins and Michel H.

We turn now to the Agency's contention that the alleged comments were not pervasive enough to constitute a hostile work environment because the incidents occurred years apart. Even if we assume, *arguendo*, that Coworker 2's comments occurred four years after Coworker 1 referred to Complainant using the N-word, we note that harassment becomes illegal when the alleged incidents of harassment become sufficiently severe *or* pervasive to constitute a hostile work environment. See Fabozzi v. Dep't of Transp., EEOC Appeal No. 0120131813 (Aug. 14, 2013). As the Commission has long held that a single incident involving the N-word can constitute a viable hostile work environment claim,⁷ we are unpersuaded that the appellate decision erred in finding a hostile work environment, even if the Coworker 2's comments occurred years apart. However, given the totality of the record, we ultimately find no error regarding the appellate decision's finding regarding the pervasive nature of the harassment with regard to all of the alleged comments (*e.g.*, the hooknose reference).

Next, we turn to the Agency's contention that the appellate decision involves clearly erroneous interpretations of material fact or law in finding that the Agency did not discipline Coworker 1 and Coworker 2. As a general matter, we initially note that "the agency has the burden of providing evidence and/or proof to support its final decision." Ericson v. Dep't of the Army, EEOC Request No. 05920623 (Jan. 14, 1993); see Gens v. Dep't of Def., EEOC Request No. 05910837 (Jan. 31, 1992). While we are mindful of the Agency's contention that the appellate decision erred in finding that the Agency did not discipline Coworkers 1 and 2, it appears that the Agency misunderstands the appellate decision. We note that that the appellate decision did not reach a finding of discrimination based on whether the Agency actually disciplined Coworkers 1 and 2. Rather, the decision was based on the Agency's failure to prevail on its affirmative defense, as the available record did not contain evidence that corroborated the Agency's assertion that it disciplined Coworkers 1 and 2. Indeed, we note that Person A, who had firsthand knowledge of the disciplinary actions that were allegedly taken against Coworkers 1 and 2, repeatedly declined to specify the nature of the disciplinary actions on the grounds of privilege.

⁷ See Tristan W. v. Dep't of the Army, EEOC Appeal No. 2019005780 (Aug. 27, 2020), citing EEOC Compliance Manual Section 15, "Race and Color Discrimination," No. 915.003, at 15-VII.A.2 (Apr. 19, 2006).

We recognize that Complainant admitted during the EEO investigation that Person A told him that Coworker 1 had been disciplined for his actions; however, we conclude that this evidence does not excuse the Agency of its burden of providing sufficient evidence and/or proof to support its final decision. As the Agency failed to do so, we find that the appellate decision did not err in finding in holding the Agency liable for harassment.

Finally, we address the Agency's contention that the appellate decision will have a substantial impact on its policies, practices, or operations, as the appellate decision appears to suggest that "the appropriate discipline for the alleged incident from January 2016 is removal from federal service." Again, we find that the Agency misunderstands the appellate decision. While we acknowledge that the appellate decision made note that Coworker 1 and Complainant worked together on a temporary assignment approximately four years after the alleged comments were made, we are unpersuaded that the appellate decision expressly or impliedly suggested that removal is the only appropriate disciplinary action. Rather, it is apparent to us, that the appellate decision cited Complainant's subsequent work history with Coworker 1 as evidence that the Agency never took its legal obligation to address harassment seriously.

We emphasize that a request for reconsideration is not a second appeal to the Commission. See EEOC Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 9, § VII.A. Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. Based on the foregoing, we conclude that the Agency cannot meet this standard.

CONCLUSION

After reviewing the appellate decision and the entire record, we find that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the request. The decision in EEOC Appeal No. 2021001460 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth below.

ORDER

To the extent the Agency has not already done so, the Agency is ordered to:

1. Within 90 days from the date that this decision is issued, the Agency shall complete a supplemental investigation in order to determine Complainant's entitlement to compensatory damages. The Agency shall afford Complainant the opportunity to submit evidence in support of his claim for damages within the 90-day time frame, and Complainant shall cooperate with any additional evidentiary requests made by the Agency. Within 30 days of the date that the Agency determines the amount of compensatory damages owed Complainant, the Agency shall pay that amount;

2. Within 90 days from the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive training to Person A, Person B, Coworker 1, and Coworker 2 regarding harassment under Title VII. If the designated employees are no longer employees of the Agency, then the Agency shall furnish documentation of their departure date(s).
3. Within 60 days from the date this decision is issued, the Agency shall consider taking disciplinary action against Person A, Person B, Coworker 1, and Coworker 2. 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. If any of the designated employees have left the Agency's employment, then the Agency shall furnish documentation of their departure date(s).

POSTING ORDER (G0617)

The Agency is ordered to post at the Department of the Navy's Washington Naval Yard, Washington D.C. 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 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.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

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

September 19, 2022

Date