



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

[REDACTED]
Larraine D.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Citizenship and Immigration Services),
Agency.

Request No. 2022003561

Appeal No. 2021001090

Agency Nos. HS-CIS-25241-2016, HS-CIS-27038-2016

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. 2021001090 (May 5, 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).

At the time of events giving rise to this complaint, Complainant worked as an Immigration Services Officer at the Agency's National Benefits Center in Overland Park, Kansas. On February 4, 2016, Complainant filed EEO complaints² which were consolidated by the Agency and alleged that the Agency harassed and discriminated against her on the bases of race (African American), sex (female), age (born in 1965), and in reprisal for 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.

² Complainant's first complaint included claims a – h and alleged discrimination and harassment based on race, sex, age, and reprisal. In a second complaint, Complainant alleged that the remaining claims, claims i – r, were reprisal for her first complaint.

- a. Complainant's coworkers talked about her, spread lies and rumors to new officers on her team and to her supervisor, and posted comments on Facebook;
- b. on November 10, 2015, management made racially charged and retaliatory comments by "stating she was playing all of the trump cards like race and sex and trying to see which one would stick to the wall;"
- c. after reporting the harassment, she was ostracized, and others changed their communication style with her which included copying the section chief on all emails;
- d. in or around October 2015, she was told not to submit a telework application because the due date had passed while she was out on medical leave;
- e. management scrutinized her work and questioned her telework usage;
- f. on November 24, 2015, management pressured her to find out if she was going to pursue a formal EEO complaint;
- g. management gave her negative feedback on her 2014 performance plan and appraisal (PPA);
- h. management questioned her time and attendance;
- i. management allowed her coworkers to make disparaging comments towards her and ostracize her;
- j. management checked on her to see if she was talking;
- k. management accused her of being unapproachable;
- l. management did not allow her to work overtime related to her position;
- m. management excluded her from lunches and a social function;
- n. management asked her colleagues about her absence from work;
- o. management falsely accused her of not completing mandatory training;
- p. management refused to give her new supervisor WebTA access in advance as she believes is customary;
- q. on October 18, 2016, she was issued a lower rating than she feels is warranted for her FY 2016 PPA; and

- r. on June or July of 2016, she was not selected for an Immigration Services Officer position.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing but subsequently withdrew her request. Consequently, 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 her to discrimination as alleged. Complainant filed an appeal with the Commission.

In our prior decision, with respect to claim f, we determined that Complainant established that the Agency subjected her to reprisal. Larraine D. v. Dep't of Homeland Sec., EEOC Appeal No. 2021001090 (May 5, 2022). S2 offered to move her to a new team and allegedly told her it would be difficult to prove discrimination against S1. S2 further stated that his offer to move her to a new team would be unavailable if she filed an EEO complaint.³ Complainant stated she felt pressured and harassed. The Commission found that statements by the second line supervisor (S2) about the transfers, even if well intentioned, coupled with his inquiry about whether Complainant would file a formal complaint were sufficient to reasonably likely deter a person from engaging in the EEO process. We also noted that S2's comments were not made during official settlement discussions. Thus, we concluded that Complainant established reprisal by a preponderance of the evidence as to claim f. However, with respect to all other claims, we determined that Complainant failed to rebut the Agency's legitimate, nondiscriminatory reasons for its actions. Lastly, we determined that the harassment allegations, taken as a whole, were insufficiently severe or pervasive to constitute a hostile work environment.

As a result of this finding of reprisal in claim f, the Commission ordered the Agency to: provide eight hours of EEO training to S2, with a special emphasis on the Agency's obligation to prevent retaliation and interference with the EEO process; consider taking disciplinary action against S2; undertake a supplemental investigation to determine Complainant's entitlement to compensatory damages under Title VII; and cease and desist from discouraging employees from engaging in the EEO process. In addition, we ordered a posting and attorney's fees, if applicable. Id.

On June 6, 2022, the Agency submitted a request for reconsideration.⁴ The Agency requests that the Commission reconsider its May 5, 2022, decision only as it pertained to claim f.

³ The record contains an email from S2 requesting further information from the Assistant Center Director as to whether he could move forward with a transfer once an investigation started. There was no response in the record.

⁴ The Agency also submitted a copy of Complainant's Petition for Attorney's Fees and its response to Complainant's Petition. The Agency was previously ordered, in EEOC Appeal No. 2021001090, to process Complainant's claim for attorney's fees in accordance with 29 C.F.R. §

The Agency does not contest the prior decision's determination regarding the remaining claims. The Agency asserts that our appellate decision erroneously interpreted material facts by finding that S2 retaliated against Complainant when he discussed moving/transferring Complainant to another team and inquired about whether she would file a formal complaint. The Agency argues that, to let the decision stand as is, would have a substantial and detrimental impact on the policies, practices, and operations of the Agency. The Agency argues that reversal is warranted as the decision failed to address that Complainant lacked prior EEO activity; Complainant ultimately filed a complaint, so she was not deterred; and the meeting was in fact held for settlement purposes. The Agency requests that a finding of reprisal as it pertains to claim f be reversed. Complainant did not provide a response to the Agency's request.

We determine that the matters addressed by the Agency in the instant request were raised or could have been raised below. The Commission emphasizes that a request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 §VII.A. (Aug. 5, 2015); see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). 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. The Agency has not done so here.

In claim f, Complainant alleged that, on November 24, 2015, management engaged in unlawful retaliation when it pressured her to find out if she was going to pursue a formal EEO complaint. The Agency argued that S2's actions clearly did not deter Complainant as she ultimately filed an EEO complaint and therefore there could be no reprisal. This argument is flawed for the issue is whether S2's actions would be reasonably likely deter a person from engaging in the EEO process. We also remind the Agency that regarding retaliatory harassment, a complainant only needs to show that such actions are the type of action that would dissuade a reasonable employee from making or supporting a charge of discrimination. See Burlington N. & Santa Fe R.R. Co. v. White, 548 U. S. 53 (2006); see also EEOC Enforcement Guidance on Retaliation and Related Issues (Enforcement Guidance on Retaliation), No. 915.004 (Aug. 25, 2016); Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000).

Furthermore, the Agency argues that Complainant lacked prior EEO activity. The anti-retaliation provisions made it unlawful to discriminate against an individual because he or she has opposed any practice made unlawful under the employment discrimination statutes. Enforcement Guidance on Retaliation at II.A. Examples of opposition include threatening or planning to file a formal complaint alleging discrimination, complaining to anyone about alleged discrimination against oneself or others, refusing to obey an order because of a reasonable belief that it is discriminatory, and requesting reasonable accommodation or religious accommodation. Clearly, in this case, S2 believed that Complainant was going to file an EEO complaint and attempted to dissuade her from doing so.

1614.501. The Agency should issue a separate final Agency decision regarding the Petition. Accordingly, this is not properly before the Commission and will not be addressed herein.

After reviewing the previous decision and the entire record, the Commission finds 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. 2021001090 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

The Agency shall take the following actions:

1. Within 90 days from the date this decision is issued, the Agency shall provide at least eight hours of EEO training to S2. The training shall place special emphasis on the Agency's obligation to prevent retaliation and interference with the EEO process. The Commission does not consider training to be a disciplinary action.
2. Within 60 days from the date this decision is issued, the Agency shall consider taking disciplinary action against S2 for the retaliation found to have occurred in this complaint. If the Agency decides to take disciplinary action, then it shall identify the actions taken. If the Agency decides not to take disciplinary action, then it shall set forth the reason(s) with specificity for its decision not to impose discipline. If S2 has left the Agency's employment, then the Agency shall furnish documentation of his departure date.
3. The Agency shall undertake a supplemental investigation to determine Complainant's entitlement to compensatory damages under Title VII. The Agency shall give Complainant notice of her right to submit objective evidence (pursuant to the guidance given in Complainant v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) and request objective evidence from Complainant in support of her request for compensatory damages within 45 days of the date Complainant receives the Agency's notice. No later than 90 days after the date that this decision is issued, the Agency shall issue a decision addressing the issue of compensatory damages. The final decision shall contain appeal rights to the Commission.
4. The Agency and its management shall cease and desist from discouraging employees from engaging in the EEO process.
5. The Agency shall determine Complainant's entitlement to attorney's fees and costs incurred in the processing of EEOC Appeal No. 2021001090 as well as the processing of the instant request as instructed below under "ATTORNEY'S FEES". The Agency shall issue a decision addressing the issue of attorney's fees and costs. The final decision shall contain appeal rights to the Commission.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its National Benefits Center facility in Overland Park, Kansas, 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.

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

November 28, 2022

Date