



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Lenny W.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Field Areas and Regions),
Agency.

Appeal No. 2021003766

Agency No. 4B-070-0248-20

DECISION

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 May 14, 2021 final decision concerning an equal employment opportunity (EEO) complaint alleging employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq., and 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's bid position with the Agency was as a Supervisor, Customer Service in Hoboken, New Jersey. Complainant, however, had been on a detail outside of Hoboken for approximately eight years, as part of the Route Inspection Team for the Northern New Jersey District. Report of Investigation (ROI) at 132.

On December 3, 2020, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the bases of age (57) and reprisal for prior protected EEO activity (reporting an alleged inappropriate/romantic relationship between a male supervisor and an acting female supervisor).

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.

By letter dated December 15, 2020, the Agency accepted the formal complaint for investigation and determined that it was comprised of the following claims:

1. On or about August 10, 2020, [Complainant was] required to return to [his] position at Hoboken and [he was] met with hostility from [his] co-workers and the Postmaster.
2. On or about August 10, 2020, [Complainant was] forced into a new position with early hours and no formal training.
3. On August 17, 2020, [Complainant was] placed on Leave Without Pay/Emergency Placement.
4. On August 27, 2020, [Complainant was] issued a Proposed Letter of Warning in Lieu of a 14 Day Suspension.
5. On a date to be specified, the Postmaster requested that [Complainant] have three months of formal supervisory training.
6. On September 30, 2020, [Complainant was] notified without explanation that [he] had been referred to the District Reasonable Accommodation Committee.
7. On November 17, 2020, [Complainant was] notified that [he] could not return to Hoboken and [was] involuntarily reassigned to Rahway because two of the supervisors had filed a complaint against [him].

After an 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), finding no discrimination.

The Agency found that Complainant established a prima facie case of reprisal for claims (4), (6), and (7). The Agency found that even assuming arguendo that Complainant established a prima facie case of age discrimination and/or retaliation for all claims, the Agency articulated legitimate, nondiscriminatory reasons for its actions which Complainant failed to establish was pretext for discrimination and/or retaliation.

Regarding claim (1), the Agency stated that the Postmaster maintained that the office had been reduced from three to four supervisors and that all supervisors decided to stay in Hoboken, resulting in a junior supervisor being moved to a different location. The Agency further stated that Postmaster asserted that upon Complainant's return, Complainant was walking in an unsafe manner and not watching where he was going.

The Postmaster stated that when he tried to speak to Complainant about the matter, but that Complainant responded “Ok, [first name of Postmaster], I can do whatever I want to do” and the Postmaster replied to address him as Postmaster. FAD at 20. The Agency stated that other supervisors denied or did not recall making negative comments to Complainant. FAD at 20.

Regarding claim (2), the Agency found that the Postmaster stated he requested supervisor training for Complainant as soon as possible because Complainant told the Postmaster that he could not do the work required, and refused to work with any supervisors until he was sent to classroom training. FAD at 21.

Regarding claim (3), being placed on Emergency Placement, the Agency found that the Postmaster stated that Complainant created a disturbance in the office when he interrupted a meeting with the Postmaster, called the Postmaster a liar, and slammed his hand down on the Postmaster’s desk. FAD at 21.

Regarding claim (4), the proposed letter of warning in lieu of a 14-day suspension, the Agency stated that the Postmaster asserted that he issued the discipline due to Complainant’s behavior related to claim (3) and because Complainant reported to another management official (rather than contacting the Postmaster directly) about an alleged “inappropriate” relationship between a male supervisor and a female acting supervisor. The Agency further found that the Postmaster stated that Complainant did not support his allegations with evidence.

Regarding claim (5), the Postmaster requesting that Complainant have supervisory training, the Agency found that the Postmaster asserted that Complainant requested training because he had been away from the Hoboken Office for years, on a detail.

Regarding claim (6), Complainant being referred to the District Reasonable Accommodation Committee (DRAC), the Agency found that the Postmaster stated that he referred Complainant to the DRAC for a reasonable accommodation after he submitted medical documentation that he would not be able to supervise employees.

Regarding claim (7), Complainant being reassigned to Rahway, the Agency set forth that a management official believed that two supervisors filed a complaint against Complainant for starting a rumor that they were having an affair and that she wanted to ensure that Complainant was protected. FAD at 23.

The Agency further found that Complainant failed to establish, by a preponderance of the evidence, that the articulated reasons for management’s actions were pretext for discrimination and/or retaliation.

The instant appeal followed. On appeal, Complainant reiterates that he was subjected to discrimination and/or retaliation. Complainant asserts that there was hostility upon his return to the Hoboken facility for not taking a position at another location.

Complainant asserts that the Postmaster was comfortable with his current staff and his return created a disruption to the status quo. Complainant asserts that he should never have been put on Emergency Placement. Regarding being referred to the DRAC Committee, Complainant states that he did not have a permanent disability.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (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”).

For complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The 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, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary’s Honor Center v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency’s actions were motivated by discrimination. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep’t of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep’t of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep’t of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Claim (1)-Complainant’s Return to the Hoboken Facility

The record contains an affidavit from the Postmaster in the Hoboken facility. Therein, the Postmaster asserted that he was informed by human resources that the facility needed to reduce the supervisor compliment from four to three.

The Postmaster stated “[human resources] informed me that I was required to offer open EAS positions within the [district] to all four of the Hoboken supervisors. If someone chose voluntarily, then that supervisor would go, however, if no one volunteered, then the junior supervisor would be forced [through a reduction in force]. He informed me that I was required to offer open EAS positions within the [district] to all four of the Hoboken Supervisors. If someone chose voluntarily, then the supervisor would go, however, if no one volunteered then the junior supervisor would be forced. [Complainant] the most senior supervisor was on a detail assignment...I informed [a named management official] to give [Complainant] the first choice. [Complainant] chose to return to Hoboken.” Report of Investigation (ROI) at 254. Complainant failed to establish, by a preponderance of the evidence, that he was returned to Hoboken due to his protected classes.

To establish a claim of harassment a complainant must show that: (1) they belong to a statutorily protected class; (2) they were subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on their statutorily protected class; (4) the harassment affected a term or condition of employment and/or 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. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

Complainant asserts that he was subjected to negative comments upon his return to Hoboken, assuming *arguendo* that the comments in question were made, Complainant has not established that these comments were based on his protected classes. Complainant alleges that his fellow supervisors made various comments to him such as: “you should not come back to Hoboken, you should have taken a job somewhere else”, “you are not going to like working with me”, “you should never have come back, you should have taken a job somewhere else”, “so you are going to fix the routes that you screwed up, how ironic.”² ROI at 133. Complainant asserted that his return to Hoboken upset the status quo. ROI 137. To the extent that Complainant asserts that these comments stemmed from hostility toward him for displacing a junior supervisor and resulting in changes to other supervisors’ schedules and duties, we find that this insufficient to establish harassment based on his age. While some supervisors may have been upset that Complainant’s return to the facility would disrupt their set schedules and positions (the status quo) due to Complainant’s seniority and length of service, this alone does not establish that the comments were based on animus due to Complainant’s age.

² Complainant’s co-workers denied making these comments or stated that they did not recall making these comments. ROI at 325, 331.

See Malloy v. Dep't of Transportation EEOC Appeal No. 0120102998 (Jan. 6, 2011) (OFO finding that a manager's reference to complainant's seniority was not tantamount to age discrimination or animus based on age). In addition, to the extent Complainant asserts these comments stemmed from hostility due to changes he made to routes while on detail to the route inspection team, this also is insufficient to establish harassment based on his protected EEO classes.

Claims (2) and (5)-Complainant Being Placed in a New Position with Earlier Hours and the Postmaster's Request for Training for Complainant

We find that the Agency articulated legitimate, nondiscriminatory reasons for its actions related to claims (2) and (5). In his affidavit, the Postmaster asserted that Complainant, after being away for his position for years, informed him that he did not know any supervisor operation "including Function 4 distribution or retail, nor did he know Function 2." ROI at 258. The Postmaster further stated, "to benefit both Complainant and the Customer Service operation, I needed to provide him the opportunity to become familiar with all supervisor responsibilities, starting from the beginning of the day...it was explained to Complainant the need for complete familiarity...[Complainant]...began to work at 4:00 a.m. with the other supervisor and had no responsibility other than to learn." Id.

Regarding the Postmaster requesting formal supervisory training for Complainant (claim (5)), the Postmaster stated "[i]nitially my plan was to allow Complainant to shadow the supervisor at that time...however, Complainant refused to shadow any other supervisor, and he himself requested that he receive formal training.³ The Postmaster stated that Complainant was alleged that he was not provided formal training and at the same time alleging that he was forced to attend formal training. ROI at 269-270. The record contains an email from the Postmaster dated August 12, 2020 to various Agency officials requesting that Complainant be included for supervisory customer service training as soon as possible noting that Complainant had been away from his position at Hoboken for several years.⁴ ROI at 372.

We find that Complainant failed to establish, by a preponderance of the evidence, that the Agency's reasons for these actions were pretext for discrimination and/or retaliation.

Claim (6)-Referral to the DRAC

³ The record contains documentation reflecting that Complainant was provided training by another supervisor in Hoboken on various dates. Complainant, however, refused to sign the Individual Training Record form. ROI at 374-377.

⁴ The record reflects that Complainant was copied on the Postmaster's August 12, 2020 email. ROI at 372.

The Agency articulated legitimate, nondiscriminatory reasons regarding claim (6). The Postmaster asserted that he received medical documentation from Complainant indicating that he would not be able to supervise employees. The Postmaster asserts that it was his responsibility to find Complainant a reasonable accommodation. ROI at 273. The record contains documentation signed by Complainant's Healthcare Provider setting forth that Complainant was not able to perform the essential job function of supervising employees. ROI at 396.

Complainant did not establish, by a preponderance of the evidence, that the Agency's articulated reason was pretext for discrimination and/or retaliation. Complainant asserts that he should not have been referred to the DRAC because his condition was not permanent. However, the effects of an impairment lasting, or expected to last, fewer than six months can be substantially limiting within the definition of disability. See 29 C.F.R. § 1630.2(j)(1)(ix); Carroll G. v. Dep't of the Navy, EEOC Appeal No. 0120182208 (Dec. 11, 2019) (OFO determined that an Administrative Judge erred when finding that temporary impairments are not covered by the Rehabilitation Act).

Claim (3)-Complainant Being Placed on Emergency Placement

We find that the Agency articulated legitimate, nondiscriminatory reasons for placing Complainant on Emergency Placement. The Postmaster, in his affidavit, asserted that on August 17, 2020, Complainant entered his office without permission while the Postmaster was in a meeting. The Postmaster stated that Complainant pointed his finger in his face and yelled at him "you are a liar." The Postmaster asserted that he told Complainant not to point his finger in his face and to work quietly, Complainant responded by "slamming his hand down very hard onto the top of [the Postmaster's] glass desk."⁵ ROI at 260.

Complainant acknowledges that he referred to the Postmaster as a "liar" but states that he did not slam the Postmaster's desk but that he tapped a part of the desk with two fingers. ROI 148-150.

The record contains statements from other witnesses that support the Postmaster's version of events with respect to this matter. The record contains a signed statement from the Manager, Post Office Operations (POOM). Therein, the POOM asserted that she was on the phone with the Postmaster when someone entered the office without authorization. The POOM stated "the person continued to yell...I heard a loud noise, and I heard the Postmaster state to the person that he was causing violence in the workplace by slamming his hand on the desk...I asked who was that and the Postmaster replied [Complainant]." ROI at 379.

The record also contains a signed statement from a supervisor who states that he was in the Postmaster's Office during the incident at issue. The supervisor stated that Complainant entered the Postmaster's office without knocking "and began asking the Postmaster questions [about his job assignment]...When the Postmaster gave him the answer about his start time and schedule

⁵ The record contains an Emergency Placement memorandum from the Postmaster to Complainant dated August 17, 2020. The memorandum sets forth the same events that the Postmaster attested to in his affidavit. ROI at 195-196.

[Complainant] started pointing his finger at the Postmaster and started yelling ‘you are a liar’...” ROI at 380. The supervisor further asserted that Complainant banged his hand on the desk. Id.

We find that Complainant failed to establish, by a preponderance of the evidence, that the Agency’s articulated reasons for this matter were pretext for discrimination and/or retaliation.⁶

Claim (4)-Proposed Letter of Warning in Lieu of a 14 Day Suspension

We find that Complainant has established that his protected EEO activity was a motivating factor in him receiving this discipline. Complainant can establish a prima facie case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Specifically, in a reprisal claim, and in accordance with the burdens set forth in McDonnell Douglas, Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), affd, 545 F.2d 222 (1st Cir. 1976), and Coffman v. Dep’t of Veteran Affairs, EEOC Request No. 05960473 (Nov. 20, 1997), a complainant may establish a prima facie case of reprisal by showing that: (1) he or she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he or she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep’t of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

Complainant established a prima facie case of reprisal. Complainant reported to a management official (Manager, Operations for the Northern District of New Jersey) that a male supervisor was having an affair with a female acting supervisor (who was detailed to Complainant’s position) and that this relationship resulted in Complainant not being able to return to his bid position. The Postmaster acknowledged that this information was conveyed to him by the Manager, Operations for the District. Specifically, the Postmaster stated “I was contacted by [Manager, Operations] on August 18, 2020 and he asked me why did you kick out [Complainant] with 33 years experience and [Manager, Operations] then informed me [Complainant] told him that [a named male supervisor] is having an affair with [a named acting female supervisor] and that’s why they don’t want me in Hoboken.” ROI at 286.

⁶ We note that the record supports the contention that Complainant did not report the alleged inappropriate relationship between a supervisor and an acting supervisor to the Manager, Operations for the District until after he was removed from the office and put on Emergency Placement. The Postmaster stated that the Manager, Operations informed him of Complainant’s allegations *after* Complainant was placed on Emergency Placement. ROI at 286. In addition, the Manager, Operations, in his affidavit, stated that during this phone call with Complainant, Complainant stated that the Postmaster told him to leave the building and placed him on emergency placement. ROI at 311. Based on the foregoing, we do not find that Complainant established that the Postmaster was aware of his protected EEO activity prior to placing Complainant on Emergency Placement.

Complainant, in his affidavit, stated that he reported a possible inappropriate relationship to the Manager, Operations between a male supervisor and a female acting supervisor. He stated that there was an unwillingness to return the female acting supervisor to her position. Complainant stated he was informed that his detail had ended but that the female acting supervisor was not returned to her position (but remained in Complainant's bid position). ROI at 219-221. Complainant stated "that an inappropriate relationship and possible quid pro quo has prevented me from returning to my position." ROI at 221. In an attachment to his formal complaint, Complainant stated "I am being retaliated against for being a whistleblower for inappropriate activity...concerning a possible sexual harassment suit." ROI at 7. Based on the foregoing, we find that Complainant was opposing possible sex discrimination under Title VII and thus engaged in protected EEO activity. A person is protected against retaliation for opposing perceived discrimination if she or he had a reasonable and good faith belief that the opposed practices were unlawful. A violation of the retaliation provision can be found whether or not the challenged practice is ultimately found to be unlawful. EEOC Enforcement Guidance on Retaliation and Related Issues No. 915.004, Section II (A)(2)(c) (Aug. 25, 2016). In the instant manner, we find that Complainant had a reasonable good faith belief that he was being subjected to unlawful discrimination.

We further find that Complainant was subjected to an action that was reasonably likely to deter him or others from engaging in protected activity when he was issued the Proposed Letter of Warning in Lieu of a 14 Day Suspension. Finally, we find that there is a nexus between Complainant's protected EEO activity (opposing possible sex discrimination) and the proposed discipline. First, there is a close temporal proximity, Complainant's protected activity occurred on August 17, 2020 and on August 27, 2020, the Postmaster issued the proposed discipline. In addition, the proposed discipline directly references Complainant's protected activity, as we will discussed below. Based on the foregoing, we find that Complainant established a prima facie case of retaliation. We note that the Agency, in its final decision, also found that Complainant established a prima facie case of retaliation with respect to this matter. FAD at 17, 19.

The Postmaster in the proposed discipline references, as the first charge, the incident occurring on August 17, 2020 in his office which resulted in Complainant being placed on emergency placement (Claim (3) in which we found no discrimination and/or retaliation). However, the Postmaster also directly references Complainant's protected EEO activity in the proposed discipline. ROI at 198. The Postmaster listed as the second charge in the proposed discipline "Causing a Hostile Work Environment When [Complainant] accused [a named male supervisor] of Having an Affair with a [female acting supervisor]" The Postmaster further set forth in the proposed discipline:

You contacted [the named Manager, Operations]...and you then stated to him that [a named male supervisor] does not want you working in Hoboken because...he is having an affair with [an acting female supervisor]. I was contacted by [the Manager, Operations] on August 18, 2020, and he informed me of your baseless accusations. You failed to inform both me...and the [POOM] of your concerns.

Nor did you submit any documentation to support any of your accusations.”⁷ ROI at 198.

The record reflects that the Postmaster issued a Letter of Decision dated February 9, 2021 finding that the proposed discipline was justified. ROI at 243-244.

While the Postmaster asserts that Complainant failed to inform him of the allegations but reported them to a higher-level management official, the Agency’s own policy pertaining to harassment advises employees that they can report alleged harassment to various individuals including “any supervisor or manager.” ROI at 497.

Based on the foregoing, we find that Complainant’s protected EEO activity was a motivating factor in the Postmaster issuing Complainant the proposed discipline and the Letter of Decision concurring with the proposed discipline.

In cases such as this, where there is evidence that discrimination was one of multiple motivating factors for an employment action employment action, that is, the employer acted on the bases of both lawful and unlawful reasons, are known as mixed motive cases. Once an employee demonstrates that discrimination was a motivating factor in the employer's action, the burden shifts to the employer to prove, by clear and convincing evidence, that it would have taken the same action even if it had not considered the discriminatory factor. See Price Waterhouse v. Hopkins, 490 U.S. 228, 249, 258 (1989); Tellez v. Dep't of the Army, EEOC Request No. 05A41133 (Mar. 18, 2005). If the employer is able to meet this burden, the employee is not entitled to personal relief, that is, damages, reinstatement, hiring, promotion, and/or back pay. But the employee may be entitled to declaratory relief, injunctive relief, attorneys' fees, or costs. See Walker v. Soc. Sec. Admin., EEOC Request No. 05980504 (Apr. 8, 1999).

The Agency failed to meet its burden of establishing that it would have taken the same action (letter of warning in lieu of a fourteen-day suspension) even if it had not considered Complainant’s protected activity. While Complainant engaged in a verbal altercation with the Postmaster which resulted him being placed on emergency placement, Complainant notes that the Agency did not engage in progressive discipline (such as a reprimand or a letter of warning in lieu of a seven-day suspension) but rather jumped to a letter of warning in lieu of a fourteen-day suspension. Complainant also asserted that he had over 35 years of service and no prior discipline. Based on the record before us, the Agency has not shown by clear and convincing evidence that it would have taken the same action even if it had not considered Complainant’s protected EEO activity.

⁷ Complainant stated that other employees had confided in him regarding the alleged relationship between the supervisor and acting supervisor but that he did not provide evidence in support of his allegations to the Postmaster because he was not the management official that he reported the allegation to and that the Postmaster’s inquiries were not part of a formal investigation into his allegations (but part of an investigative interview for discipline against himself). ROI at 205, 219, 226.

We further note that, as discussed above, that Complainant's protected activity involved opposing possible sex discrimination under Title VII (not just age discrimination under the ADEA) and thus we will order the Agency to conduct a supplemental investigation with respect to the issue of compensatory damages.

Claim (7)-Reassignment to Rahway

Complainant established a prima facie case of reprisal regarding claim (7). As set forth above, Complainant engaged in protected EEO activity when he reported to a management official an alleged relationship between a male supervisor and an acting female supervisor which he alleged resulted in him not being able to return to his bid position (the position the female acting supervisor was detailed to).

The POOM acknowledged that she made the decision to reassign Complainant to Rahway because the Postmaster was on leave. We find that the POOM had knowledge of Complainant's protected EEO activity prior to reassigning him. The record reflects that the POOM was copied on the proposed discipline for Complainant dated August 27, 2020 which referenced Complainant's protected activity (see our analysis of claim (4)). ROI at 200. We find the reassignment could reasonably deter Complainant or others from engaging in protected activity. In addition, we find that there is a nexus between Complainant's protected activity and the reassignment. The POOM references the allegations made by Complainant as a reason for his reassignment. Based on the foregoing, we find that Complainant established a prima facie case of retaliation regarding this claim.⁸

We find that Complainant established that his protected EEO activity was a motivating factor in the POOM reassigning him to Rahway. The POOM asserted "[Complainant] was placed in Rahway so no harm would be done to him by placing him in the workplace environment with the two employees he had made the accusation about. The Postmaster was out on...leave and one of the accused [a named male supervisor], was left in charge...who [Complainant] would have been reporting to. I told [Complainant] I had to keep them separate until the Postmaster came back to work and the case resolved."⁹ ROI at 321.

⁸ We note that the Agency's final decision also found that Complainant established a prima facie case of reprisal regarding this claim. FAD at 17, 19.

⁹ While the POOM initially asserted that the male supervisor and the female acting supervisor filed a complaint against Complainant (ROI at 316), the record is devoid of evidence to support this assertion. Rather, the record reflects that Complainant initially reported an alleged inappropriate relationship between a male supervisor and an acting female supervisor which he asserted was impacting his job assignment.

While the Commission has stated that an employer may need to take intermediate action pending the investigation of a claim, such as transferring the alleged harasser, to ensure further harassment does not occur, the Commission has also stated that a complainant should not be involuntarily transferred or otherwise burdened, because such measures could constitute unlawful retaliation. See EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (June 18, 1999).

After the POOM reassigned Complainant to Rahway, she asserted that she later allowed Complainant to return to the District. The POOM stated that Complainant had asked to leave Hoboken and return to the District. ROI at 321. Based on the foregoing, we will order the Agency to offer Complainant the option of either remaining at his current facility or to be reassigned back to Hoboken.

Accordingly, we AFFIRM the Agency's finding of no discrimination regarding claims (1)-(3), (5)-(6). However, we REVERSE the Agency's final decision finding no unlawful retaliation regarding claims (4) and (7) and we REMAND these matters to the Agency to take the corrective action as set forth below.

ORDER

1. Within thirty (30) calendar days from the date this decision is issued, the Agency shall expunge from Complainant's personnel file and Agency records the Notice of Proposed Letter Warning in Lieu of 14-Day Suspension dated August 27, 2020 and the Letter of Decision for Notice of Proposed Letter of Warning in Lieu of a 14-Day Suspension dated February 9, 2021.
2. Within thirty (30) calendar days from the date this decision is issued, the Agency shall offer Complainant the option of remaining at his current facility or returning to the Hoboken facility.
3. Within (90) calendar days from the date this decision is issued, the Agency shall conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages with respect to the finding of retaliation regarding claims (4) and (7) and determine the amount of compensatory damages to which Complainant is entitled. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages, if any, and provide all relevant information requested by the Agency. The Agency shall issue a final decision on the issue of compensatory damages with appeal rights to the Commission. A copy of the final decision must be provided to OFO as referenced below in the section entitled "Implementation of the Commission's Decision." Within thirty (30) days of its determination of the amount of compensatory damages owed to Complainant, the Agency shall pay Complainant that amount.
4. Within ninety (90) days from the date this decision is issued, the Agency shall provide eight (8) hours of in-person or interactive training to the Postmaster and the POOM.

5. The training shall emphasize management's obligation not to engage in reprisal in violation of EEO statutes.
6. Within sixty (60) days from the date this decision is issued, the Agency shall consider taking disciplinary action against the responsible management officials (the Postmaster and POOM). 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 responsible management officials have left the Agency's employment, then the Agency shall furnish documentation of their departure date(s).
7. The Agency shall post a notice in accordance with the paragraph entitled "Posting Order."

The Agency is 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). The report must include supporting documentation that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Hoboken, New Jersey facility 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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. If you file a request to reconsider and also file a civil action, **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

February 22, 2023

Date