



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

[REDACTED]
Marine V.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2022003965

Hearing No. 470-2021-00064X

Agency No. BOP-2020-01726

DECISION

Simultaneously with its July 15, 2022, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of a determination by an EEOC Administrative Judge (AJ) finding discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.

BACKGROUND

During the period at issue, Complainant worked for the Agency as a Case Manager, GS-11, at the United States Penitentiary, Big Sandy, in Inez, Kentucky.

On September 1, 2020, Complainant filed a formal EEO complaint. Complainant claimed that the Agency discriminated against and subjected her to discriminatory harassment based on sex (female) and in reprisal for prior protected EEO activity² 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 testified in her affidavit that in August 2018, she had an incident with the Unit Manager, the same responsible management official identified in the instant complaint, where

1. On July 1, 2020, Complainant was subjected to a hostile work environment in the form of bullying and intimidation tactics by the Unit Manager when Complainant questioned him regarding a work schedule change. Additionally, Complainant alleges that management officials failed to appropriately address Complainant's report of harassment. Finally, Complainant alleges that the Unit Manager has a history of bullying staff.
2. On October 28, 2020, Complainant received a poor quarterly evaluation from her first level supervisor (Unit Manager).
3. On July 1, 2021, Complainant was made aware of an Unprofessional Conduct case that the Unit Manager had filed against her as a result of the July 1, 2020 incident.

After an investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. Thereafter, the Agency filed a motion for summary judgment, which Complainant opposed. On January 20, 2022, the AJ granted the Agency's motion in part, by dismissing the reprisal claims for claims 1 and 3. The AJ determined that the remaining matters concerning sex discrimination and hostile work environment for claim 1 and the reprisal matter for claim 2 would be addressed during a hearing.

On May 10, 2022, the AJ held a hearing where Complainant and three witnesses (the Unit Manager and two male co-workers) testified. After the hearing, the AJ issued a bench concluding Complainant failed to demonstrate that she was subjected to discriminatory harassment or retaliation. The AJ explained that the record supported that the Unit Manager had altercations with both male and female employees, and therefore, the Unit Manager's actions toward Complainant could not be attributed to her sex. Additionally, the AJ determined that the harassment allegations, even if true, were not severe or pervasive enough to constitute discriminatory harassment in violation of Title VII. The AJ further reasoned that Complainant failed to demonstrate that she was retaliated against when the Unit Manager reduced her rating from "Outstanding" to "Exceeds" in one category on her performance evaluation.

However, the AJ determined that Complainant had established that the Agency discriminated against her based on her sex when the Agency failed to take immediate corrective action to address her report of a verbal altercation with the Unit Manager but took immediate corrective

she alleged that he cursed at her. Complainant stated that the Unit Manager denied the allegations and following her report of the incident, she received a proposal to work "three days on the street." Ultimately, Complainant indicated that she received a letter of reprimand, but the Unit Manager was never disciplined. Complainant indicated her issues with the Unit Manager were never resolved.

action to address similar reports of verbal altercations made by Complainant's two male co-workers (Co-worker 1 and Co-worker 2) against the same management official.

By way of relief, the AJ awarded Complainant \$6,500 in non-pecuniary compensatory damages and \$4,400 in attorney's fees. The AJ also awarded ten hours of restored sick leave and ten hours of restored annual leave, training for Unit Manager, and the posting of a notice of discrimination.

On July 15, 2022, the Agency issued a final order rejecting the AJ's finding of discrimination filed the instant appeal.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

Disparate Treatment

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For complainant to prevail, she must first establish a prima facie 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 Department of Community 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 Service Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Department of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Department of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Washington v. Department of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

In this case, the AJ determined that Complainant had established a *prima facie* case for sex discrimination because the record reflected that Complainant was a member of a protected class, she was subjected to adverse treatment, and she was treated differently by otherwise similarly situated employees outside of her protected class. Here, the AJ determined that the Agency discriminated against Complainant based on sex when it took immediate action to address the complaints of Co-workers 1 and 2 (both male) against the Unit Manager, but unreasonably delayed responding to similar complaints made by Complainant against the Unit Manager. As further explained below, we agree.

To demonstrate that another employee is a similarly situated comparator, Complainant must show that all relevant aspects of the comparator's work situation were nearly identical to their own. See Davis v. Dep't of Labor, EEOC Appeal No. 0120101468 (Jun. 24, 2010); see also Haywood v. U.S. Postal Serv., EEOC Appeal No. 0120092765 (Dec. 2, 2009). Contrary to the Agency arguments on appeal, the record reflects that Co-workers 1 and 2 and Complainant were similarly situated comparators. The record indicates that Complainant, and Co-workers 1 and 2 were Case Managers and all three individuals reported to the same supervisor – the Unit Manager.

The record further indicates that Complainant and Co-workers 1 and 2 reported separate instances of verbal altercations with the Unit Manager which resulted in different responses by Agency management. Complainant testified that on July 1, 2020, she left the Unit Manager's office after he denied her request for a schedule change, but the Unit Manager followed her to her office. Complainant stated that the exchange between her and the Unit Manager was "heated," and she asked him to leave multiple times, but he refused. When Complainant attempted to leave her office, she stated that the Unit Manager prevented her from doing so which made her fear for her safety. Complainant indicated that she was shaken up, crying, felt threatened and scared and she described the incident as a "bad situation." The record indicates that the Agency did not conduct a threat assessment until July 14, 2020, and it was around this period, approximately two weeks after the incident occurred, that the Unit Manager testified that he was directed to move his office.³

³ However, the Union Representative testified that the Unit Manager did not actually move his office until approximately three months later.

The results of the threat assessment were not completed until July 24, 2020, which recommended, in pertinent part, that the Unit Manager be removed from Complainant's chain-of-command and that the Unit Manager's office be relocated outside the immediate area.

By contrast, Co-worker 1 testified that the Unit Manager threatened to "whoop [Co-worker 1's] ass" if the Unit Manager learned that Co-worker 1 was the employee who had reported that the Unit Manager had threatened another staff member during a softball game. Co-worker 1 explained that during this conversation, the Unit Manager jumped out of his chair, clinched his fists, and came across the table as if he was trying to punch Co-worker 1. Co-worker 1 testified that the Assistant Warden witnessed the incident and the Unit Manager immediately removed from Co-worker 1's unit, and Complainant was assigned a new manager. Consequently, Co-worker 1 testified that he did not see the Unit Manager for two months immediately following his altercation with the Unit Manager. In contrast, the record supports that Complainant had to wait two weeks for the Agency to begin the process of separating her from the Unit Manager.

Although Co-worker 2 acknowledged that he and the Unit Manager had "several different heated conversations," Co-worker 2 indicated that one altercation in particular resulted in a threat assessment. In that incident, Co-worker 2 testified that he sent an email to the administrative staff explaining how he had felt "pretty aggravated" in response to the Unit Manager's actions toward him. Co-worker 2 stated that the threat assessment "happened very quickly after" he sent the email. Specifically, Co-worker 2 indicated that he was called in for questioning the day after he sent the email and management separated the Unit Manager from him that day. Thereafter, Co-worker 2 explained that the Unit Manager was moved to different unit after the threat assessment concluded. Again, in this instance, the Unit Manager was moved shortly after Co-worker 2 reported the incident while Complainant, who had a similar altercation with the Unit Manager, had to wait a two-week period before management took any action to address her complaint.

Finally, the record supports that all three employees were subjected to the same standards governing discipline. The Agency argues that because Co-workers 1 and 2 were not previously disciplined by the Unit Manager but Complainant was, Complainant and Co-workers 1 and 2 were not similarly situated. First, we are unpersuaded that this factor was relevant to management's response to complaints about misconduct by the Unit Manager rather than the three employees. Moreover, Co-worker 2 testified that the Unit Manager had suspended him for failing to follow a direct order.

Our review of the record supports that the AJ correctly determined that Complainant and Co-workers 1 and 2 were similarly situated. Our review further indicates that the Agency failed to take any action during the approximate two period between the July 1, 2020 incident and July 14, 2020 – the start of the threat assessment. In contrast, the record supports that the Agency took immediate action regarding complaints against the Unit Manager by Co-workers 1 and 2, two male employees. Agency officials have not articulated any sufficient reason for its disparate treatment in its response to Complainant's complaints against the Unit Manager, when compared to the Agency's quick response to her male co-workers' complaints.

The AJ's finding that Complainant was discriminated against based on sex when it took immediate action to address Co-workers 1 and 2's complaints against the Unit Manager, but unreasonably delayed responding to similar complaints made by Complainant against the Unit Manager is AFFIRMED.

Remedies

As an initial matter, we note that, on appeal, the Agency does not dispute with any specificity the AJ's remedial awards which included: (1) \$6,500 in non-pecuniary compensatory damages; (2) \$4,500 in attorney's fees; and (3) restoration of ten hours of sick leave and ten hours of annual leave. Therefore, these awards are affirmed.

CONCLUSION

Accordingly, we REVERSE the Agency's final order rejecting the AJ's findings of discrimination and award of compensatory damages. We AFFIRM the AJ's remedial order as stated in our Order below. We REMAND this matter to the Agency in accordance with the Order below.

ORDER

The Agency is ORDERED to take the following actions within ninety (90) calendar days from the date this decision is issued:

1. The Agency shall pay Complainant \$6,500 in non-pecuniary compensatory damages.
2. The Agency shall pay Complainant \$4,400 in attorney's fees.
3. The Agency shall restore ten hours of sick leave and ten hours of annual leave to Complainant.
4. The Agency shall provide at least four hours of EEO training to the Unit Manager. The training shall address the current state of the law on sex discrimination. The Agency may contact our Training and Outreach Division for Assistance in obtaining the necessary training via, <https://www.eeoc.gov/federal-sector/federal-training-outreach>.
5. The Agency shall consider taking appropriate disciplinary action against the Unit Manager. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. 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 the responsible management official has left the Agency's employ, the Agency shall furnish documentation of their departure dates.

6. If Complainant was represented by an attorney, the Agency shall pay reasonable attorney's fees for this appeal in accordance with Paragraph (H1019) below.
7. Within 30 calendar days of the date this decision is issued, the Agency shall post a notice in accordance with Paragraph (G0617) below.

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 at United States Big Sandy Penitentiary copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted both in hard copy and electronic format by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored.

Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

August 9, 2023

Date