



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

[REDACTED]
Lynwood R.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 0120171820
Hearing No. 410-2015-00297X
Agency No. 200I-0508-2014103858

DECISION

Complainant timely 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 March 28, 2017, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission VACATES the Agency's final order, and REMANDS the matter.

ISSUES PRESENTED

Whether the AJ properly issued a decision without a hearing finding that the Agency did not discriminate against, nor subject Complainant to a hostile work environment, based on sex or in reprisal for prior EEO activity.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Materials Handler at the Atlanta Veterans Affairs Medical Center in Decatur, Georgia.

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 December 30, 2013, Complainant found a stack of women's magazines (Ladies Home Journal, Better Homes and Gardens) on his desk. He also found his holiday ornaments broken and beheaded. Complainant stated that he reported the incident to an Acting Supervisor (AS) and the Warehouse Supervisor (WS), who did not investigate, and never responded to his concerns. Report of Investigation (ROI) at pgs. 141-142, 225.

On March 19, 2014, Complainant stated that a coworker (CW1) spoke to him in a condescending, loud, and disrespectful manner. Complainant stated that WS was with him but did not say anything to defuse the situation. On April 18, 2014, another coworker (CW2) yelled at Complainant, "I ain't doing it! I ain't doing your mail for you! All you do is lollygag! I ain't doing your work!" Complainant stated that he called the Chief of Logistics (CL), who refused to respond or come to the mail center. On May 1, 2014, CW1 called Complainant a "motherfucker" and dared Complainant to call the police. ROI at pgs. 142, 143, 151-152.

On April 7, 2014, CL issued Complainant a proposed 3-day suspension for disrespectful conduct towards another person and use of obscene language towards another employee. Specifically, on December 20, 2013, Complainant stated, "Fuck you!" to another coworker (CW6); and sent an email stating that "one chubby fellow refuses to do it while the old dude simply does not want to do it." ROI at pgs. 162-163. The Associate Director issued the decision to suspend Complainant for three days on June 10, 2014. ROI at pg. 419.

In June 2014, Complainant started a detail assignment as a Service Line driver. ROI at pgs. 221, 312. On June 4, 2014, a special meeting was called in the Distribution section with two EEO managers. Another coworker (CW3), yelled profanity and directed "racial rants" towards Complainant. CW3 stated that "this is a plantation ... they only hire light-skinned Blacks." Complainant stated that CW3 also referred to him when she stated, "[S]omebody big and Black they got to intimidate us." A witness also noted that CW3 repeatedly used the n-word. Complainant stated that when he and others filed complaints, the EEO managers claimed they could not substantiate CW3's comments. ROI at pgs. 143, 154, 155.

On July 4, 2014, Complainant's first line supervisor (S1) informed him that WS requested that Complainant be restricted from an area where another coworker (CW4) worked, because CW4 did not like Complainant.

On July 8, 2014, Complainant was involved in a vehicle accident while performing his duties as a courier. He stated that because CL denied him the proper tools of a GPS and cell phone, he became disoriented and got lost. On July 9, 2014, Complainant stated that AS informed Complainant that he needed to move workstations because another coworker wanted to work at that workstation, even though there were other workstations available. ROI at pg. 149.

In his affidavit, Complainant stated that on December 10, 2014, he was in the middle of a conversation with WS and a coworker when another coworker (CW5) interrupted to complain about S1. CW5 called him a "fucking faggot ass," and stated that he was starting to treat people like "shit."

Complainant stated that CW5 later found him, and pointed her finger at him while stating, "You better keep your mouth closed." On December 17, 2014, CW5 learned that Complainant had reported her offensive conduct, and loudly stated, "People be telling lies on me!" ROI at pgs. 279, 282.

On December 27, 2014, Complainant was involved in a car accident outside of work. Complainant had issues with his phone, so he emailed a coworker and asked him to contact his (Complainant's) supervisors to inform them that he would not be coming into work on December 30, 2014. Complainant also emailed S1. ROI at pgs. 456-457. For December 31, 2014, CL denied Complainant's leave request, and charged him with absence without leave (AWOL) and leave without pay (LWOP). On January 9, 2015, Complainant emailed CL requesting that his AWOL/LWOP be amended to available leave because he provided documentation of the accident and a physician's note. ROI at pgs. 150, 188, 190, 458.

EEO Complaint

On September 9, 2014, Complainant filed an EEO complaint alleging that the Agency subjected him to a hostile work environment on the bases of sex (male/sexual orientation), and in reprisal for prior protected EEO activity under Title VII when:

1. on December 30, 2013, the Christmas ornaments that Complainant left on a common desk were broken and beheaded;
2. on March 19, 2014, CW1 spoke to Complainant in a very condescending way by stating, "Where are you? I'm tired of this! You need to be here!" in front of WS;
3. on April 18, 2014, CW2 entered the mail center yelling at Complainant, and CL refused to intervene;
4. on May 1, 2014, CW1 called Complainant a "motherfucker," threatened him by motioning toward him with a closed fist, stating, "I dare you to call the police";
5. on June 4, 2014, CW3 yelled at Complainant, stating "That shit ain't funny," "This is a plantation ... they only hire whites and light skins...they always get someone big and Black to intimidate us," (referring to Complainant). CW3 also used the n-word more than once when talking to him;
6. on June 10, 2014, Complainant was issued a 3-day suspension due to an argument that he had with CW6;
7. on July 4, 2014, S1 told Complainant that WS requested that Complainant be restricted from any area where CW4 is because CW4 does not like him;

8. on July 8, 2014, CL denied Complainant the proper tools (a GPS and Blackberry) to perform his assigned duties, which resulted in a vehicle accident;
9. on July 9, 2014, AS made Complainant move from a workstation so that another coworker could use that workstation, even though other workstations were available;
10. on December 10, 2014, CW5 pointed her finger in Complainant's face in a threatening manner, and yelled, "You better keep your mouth closed," about her referring to S1 as a "fucking faggot ass";
11. On December 17, 2014, when CW5 learned that Complainant reported her offensive conduct, she attempted to intimidate him by loudly stating, "People be telling lies on me!";
12. On December 31, 2014, CL denied Complainant's leave, and charged him AWOL and LWOP; and
13. On an unspecified date, three coworkers approached Complainant to inform him that CW5 had spoken to them separately in attempts to instigate conflict between Complainant and the three employees.²

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 EEOC Administrative Judge (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's February 19, 2016, motion for a decision without a hearing and issued a decision without a hearing on March 12, 2017.

The AJ determined that Complainant did not establish a prima facie case of sex discrimination for claims 6, 8, and 12. For claim 6, the AJ found that there was no evidence showing that a similarly-situated employee outside of Complainant's protected classes was treated more favorably. The AJ stated that there was no evidence that a similarly-situated female was treated more favorably than Complainant. For claim 8, the AJ determined that Complainant's lack of GPS and Blackberry was not an adverse employment action that affected the terms or conditions of his employment. Regarding claim 12, the AJ found that Complainant again did not identify any similarly-situated employees outside of his protected categories who were treated differently.

The AJ also found that Complainant established a prima facie case of reprisal discrimination for claims 6, and 12, but not 8. As noted above, the AJ did not find that claim 8 was an adverse employment action.

² On January 16, 2015, the Agency amended Complainant's complaint to include incidents 10-13. The Agency also accepted incidents 6, 8, and 12 as discrete claims of discrimination.

For claim 6, the AJ found that Complainant was suspended when he verbally attacked CW6; and that Complainant did not identify evidence sufficient to give rise to a genuine issue of material fact as to whether the Agency's articulated reasons were pretextual. For claim 12, the AJ found that Complainant did not provide evidence showing that he either requested leave or notified a supervisor in advance of his absence.

For Complainant's harassment allegation, the AJ found that the link between the alleged harassment and a discriminatory motive are missing. For claims 1 and 10, he noted that the claims are only tangentially related to sex or sexual orientation; and that no evidence suggests that Complainant's prior EEO activity was related to any of the acts of harassment. The AJ concluded that there was no genuine issue of material fact as to whether Complainant was subjected to unlawful harassment as alleged.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant did not prove that the Agency subjected him to discrimination as alleged. Complainant filed the instant appeal and submitted a brief in support of his appeal on May 25, 2017. The Agency filed an opposition brief on July 5, 2017.

CONTENTIONS ON APPEAL

Complainant argues that there are genuine issues of material fact which warrant a hearing. For example, he stated that for claim 5, two additional witnesses described the incident, and support Complainant's version of events; for claim 8, all drivers receive cell phones; and for claim 10, WS and another witness overheard CW5. Additionally, Complainant asserts that he notified WS of his accident and need for leave on December 28, 2014.

For claim 6, Complainant argues that the record does not contain statements from his comparators, and the management officials were not asked about the treatment of other employees in similar situations. For claim 8, Complainant argues that an adverse employment action need not result in a tangible action, and that by not receiving a cell phone, he was treated less favorably than other drivers. For claim 12, Complainant contends that the Agency did not provide sufficient information for comparators because it did not provide information about when the employees received AWOL or regarding their sexual orientation.

Further, Complainant argues that the record is not adequately developed. Specifically, the record is missing statements from CW1, CW4, and CW5. Additionally, Complainant asserts that the AJ assumed that Complainant did not provide similarly-situated comparators because there was no evidence in the record that CW4 or CW5 were heterosexual. Finally, Complainant states that he was subjected to severe harassment because the terms faggot and the n-word are "highly offensive slurs."

The Agency argues that the AJ's decision correctly determined that there were no genuine issues of material fact to justify a reversal.

ANALYSIS AND FINDINGS

Standard of Review

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and the Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chap. 9, § VI.A. (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

Decision without a Hearing

We must determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A "material" fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Issuing a decision without holding a hearing is not appropriate for a case that can only be resolved by weighing conflicting evidence. If the non-moving party "has not had the opportunity to discover information that is essential to his opposition," then a decision without a hearing is inappropriate. Anderson, 477 U.S. at 250. The AJ must enable the non-moving party to engage in sufficient discovery to respond to a motion for a decision without a hearing.

After receiving an opposition to a motion for a decision without a hearing, an AJ may order discovery as necessary. 29 C.F.R. § 1614.109(g)(2).

We carefully reviewed the record and find that it is inadequately developed. Further, the AJ improperly determined that there are no genuine issues of material fact or credibility that merited a hearing. Therefore, the AJ's issuance of a decision without a hearing was inappropriate.

We find that a decision without a hearing was inappropriate in this case because the record is not fully developed, and there are genuine issues of material fact. The record is not complete because it does not contain statements from AS, or any of the named coworkers (CW1-CW6). For incident 10, Complainant also named another witness, who was not interviewed. Additionally, the record does not contain a response from WS for incidents 10-13. Complainant stated that WS was a witness for incident 10; and that he notified WS of his need for leave on December 31, 2014 (claim 12). Accordingly, we find that the complaint needs to be remanded to obtain additional relevant testimony.

A genuine issue of material fact exists because evidence in the record contradicts CL's statement. For claim 8, CL stated that "none of the other drivers are issued a government cell phone or GPS." ROI at pg. 300. However, one witness (W1) stated that "previous drivers had phones as part of their jobs." ROI at pg. 348. Another witness (W2) stated that he previously worked as a driver, and that "all other drivers and myself were mandatorily given phones." ROI at pg. 362. A third witness (W3) stated that "ALL Distribution drivers are definitely provided phones to maintain communications and in the event of road emergencies." ROI at pg. 376.

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrenner, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." Pedersen v. Dep't of Justice, EEOC Request No. 05940339 (February 24, 1995). We find that a hearing is necessary to make a credibility determination with regards to CL's testimony.

While we note that the AJ found that Complainant's lack of cell phone and GPS was not an adverse employment action, we find that Complainant has shown an injury or harm to a term, condition, or privilege of employment for which there is a remedy. See Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (April 21, 1994). The Agency provided cell phones and/or GPS as a privilege of employment for their drivers,³ and CL denied a cell phone to Complainant. As such, Complainant has a viable discrimination claim that he was treated differently than other drivers.

³ CL stated that the Agency has GPS in certain vehicles, but that it does not purchase GPS devices. ROI at pg. 300.

Additionally, we find that there is a genuine issue of material fact with regards to identifying similarly-situated comparators for claim 6. The AJ stated that there was a lack of evidence regarding CW4 and CW6. We find that the record needs to be further developed to determine if CW4 and CW6 are outside of Complainant's protected class. While the AJ noted that Complainant did not identify any female comparators, the record shows that CW3 used profanity and the n-word during the June 4, 2014 meeting. Complainant was suspended for use of profanity and disrespectful conduct towards another employee, and it can be argued that CW3's conduct was similar to Complainant's. More information is needed to determine if CW3 is an appropriate comparator with regards to Complainant's suspension.

We further find that additional information is needed to determine if there was a hostile work environment based on Complainant's sex or in retaliation for his prior EEO activity. Witnesses provided statements to suggest that this needs to be further explored. S1 stated that he believed that there is a hostile work environment. ROI at pg. 320. W1 stated that she believed that the environment was "very hostile" for Complainant, and that she witnessed hostility directed at him by coworkers. She added that she believed that incidents 1, 5, 6, 8, and 9 were due to Complainant's sex, and in reprisal for his EEO activity. ROI at pgs. 342, 345, 346, 348, 350. W2 repeatedly noted that it was "obvious" that management was retaliating against Complainant for his prior EEO activity. ROI at pgs. 356, 361, 363. W3 stated that she learned of the animus towards Complainant from coworkers' comments that include calling Complainant "questionable." ROI at pg. 368. Accordingly, we find that a decision without a hearing was not appropriate for this complaint and will remand the matter back for a hearing in accordance with the Order below.

While we note that Complainant has not included race as a basis for the instant complaint, the record shows that the n-word was directed towards Complainant during the meeting on June 4, 2014.⁴ The Commission has held that a complainant may allege discrimination on all applicable bases and may amend his or her complaint at any time to add or delete bases without changing the identity of the claim. Drago v. U.S. Postal Serv., EEOC Request No. 05940563 (Jan. 19, 1995); accord, Sanchez v. Standard Brands, Inc., 431 F. 2d 455 (5th Cir. 1970). We remind Complainant that he can consider including race as a basis for his complaint, if he wishes to do so.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that a decision without a hearing was not proper; and VACATE the Agency's final order, and REMAND the case back to the Agency for further processing in accordance with the ORDER below.

⁴ The record contains statements from four (4) witnesses who support Complainant's assertion that CW3 used the n-word, and it was directed at him. ROI at pgs. 155, 344-345, 358, 372.

ORDER

The Agency shall submit to the Hearings Unit of the EEOC Atlanta District Office a request for a hearing within 15 calendar days of the date this decision is issued. The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within 15 calendar days of the date this decision is issued. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective 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 CFR § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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)

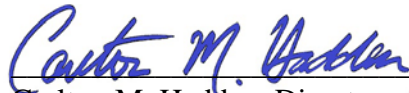
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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

September 30, 2019

Date