



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]

Colby S.,¹
Complainant,

v.

Steven T. Mnuchin,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Appeal No. 0120172604

Hearing No. 480-2015-00385X

Agency No. IRS-14-0257F

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 June 29, 2017, final decision 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 **AFFIRMS** the Agency's final decision.

ISSUES PRESENTED

The issues presented are whether Complainant proved that the Agency is liable for harassment he experienced from a coworker, and whether Complainant's supervisor subjected him to disparate treatment because of his sex and prior EEO activity.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Tax Specialist, GS-11, within the Agency's Small Business/Self-Employed Division (SBSE) of the Internal Revenue Service (IRS) in Fresno, California.

On April 29, 2014, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him on the basis of sex (gay male) and in reprisal for prior protected EEO activity when:

1. On unspecified dates, the Group Secretary (C1) made Complainant the punch line of her sexual jokes;
2. On February 25, 2014, Complainant asked C1 to compare his timesheet with what she input into the timekeeping system, and she yelled at him and said, "Don't tell me what to do; you're not my manager." C1 also pointed her finger at him and told him to "just walk away;"
3. On a regular basis, C1 incorrectly inputs Complainant's time into the timekeeping system, purposefully causing his leave balances to be inaccurate;
4. On a regular basis, C1 routinely fails to process Complainant's cases into the Audit Information Management System (AIMS), processing some of his cases, but claiming she does not see others;
5. On a regular basis, C1 does not process (or resists processing) Forms 5345-D and 895 for Complainant; and
6. On July 10, 2014, Complainant received an unwarranted Memorandum from his manager (S1).

In an investigative statement, Complainant stated that he believed that C1 became aware of his sexual orientation in the previous 25 years, and that he has known C1 since his early days at the Agency. Complainant further stated that he previously engaged in EEO activity when he made a complaint to his General Manager (GM) on October 6, 2009 regarding an incident that occurred on August 14, 2009, and GM made C1 aware of his complaint.

Regarding claim 1, Complainant stated that there were several instances wherein C1 made him feel extremely uncomfortable, but he did not have dates or recall witnesses to the events. He stated that many of the jokes negatively stereotyped him as a gay male and included asking him about his sexual behavior and referring to him as a "tramp." Complainant further stated that on one occasion, C1 asked him in front of a coworker if he had been "a tramp in the streets of Denver," or something similar.

Complainant further stated that in another incident, C1 asked him questions about her male roommate, inquired if he had been sexually intimate with her roommate, and to describe her roommate's genitalia if they had been intimate.

Complainant further stated that on another occasion, he was told that C1 referred to him as "Mary" to a coworker (C2), and C2 also told him that C1 had used the term "fag hag" in the office. Complainant also stated that before he began working in the group in October 2007, C1 referred to him as "[Complainant] the Fairy" during a conversation with S1.

Complainant stated that on October 6, 2009, he sent S1 an email in which he reported that on August 14, 2009, he was "verbally bashed" by C1 when she used the word "gay" at least half a dozen times during an attack on him. In the email, Complainant reported that two coworkers (C3 and C4) witnessed the attack, and C1 told C3 that Complainant should know better than to attack C1. Complainant stated that this October 6, 2009 email was the first time he informed anyone about the harassment.

S1 stated that he was initially made aware of Complainant's harassment allegations through Complainant's October 6, 2009 email. He stated that he was made aware that C1 referred to Complainant with stereotypical language concerning his sexual orientation, but he was not made aware of any specific jokes. S1 further stated that management investigated the incident. After working with Labor Relations, an EEO Counselor was brought in to speak to the group at a meeting to go over EEO guidelines; a Power Point on sexual harassment was presented at a group meeting; the Treasury Inspector General for Tax Administration (TIGTA) spoke to the group on the matter; and the union president was available for counseling. S1 further stated that Complainant and C1 were offered a meeting to mediate and resolve any disputes with an EEO mediator, but Complainant pulled out of the meeting the day before it was scheduled to occur. S1 also stated that he investigated the matter by speaking to a witness to the incident (C4), who provided a written statement from C4's perspective.

Regarding claim 2, Complainant stated that on February 25, 2014, he asked C1 to prepare his timesheet, but instead of doing this, she yelled at him and said, "Don't tell me what to do; you're not my manager." He also stated that C1 told him to "just walk away." Complainant stated that this incident occurred late in the day, and there were no witnesses, but he immediately emailed S1 about the incident and spoke to a Tax Compliance Officer about it.

C1 stated that on February 25, 2014, Complainant sent her a timesheet that was incorrect, and she returned it to him for corrections. She stated that Complainant did not understand her comments about how to fix the timesheet and asked for clarification via email. C1 stated that she then emailed him instructions on how to correct the issue, and Complainant walked into her work area and asked her in a very angry tone why she could not do her job properly. She stated that he could correct the problem if he came to her desk, but he responded that he would not come to her desk, to which she responded that it was "fine" with a wave of her hand.

S1 stated that the process for entering data into the timekeeping system had recently changed, and employees are now required to enter their own timesheets and make any corrections themselves. He stated that at the time of the events at issue, C1 was charged with inputting time into the system and making corrections needed after an employee contacted both C1 and the Group Manager regarding a potential error. S1 further stated that C1 told him about Complainant's timekeeping issues, and she lodged a complaint that Complainant had treated her very rudely. S1 stated that virtually all employees in the group had various errors with their timekeeping, and sometimes they were caused by the employee, sometimes caused by the timekeeper.

Regarding claim 3, Complainant stated that there was an ongoing problem with C1 not inputting his credit hours into the timekeeping system. He stated that he did not work many credit hours, but when there was a problem, C1 would "mouth off" and make it difficult to resolve the issue. He stated that he asked S1 for a printout of his leave balance every pay period, but S1 responded that C1 did not have time to do so. Complainant also stated that a Tax Compliance Officer also had issues with the input of her leave, and that C1 made it known to the group that she would sabotage work if she did not like someone.

C1 stated that Complainant has not lost any time nor has anyone reported an issue with their time being incorrect because of her timekeeping. She stated that S1 ultimately validated timesheets, and if any employee had issues with their timesheets, they could speak to her or S1. S1 stated that Complainant brought this matter to his attention a couple of times over the course of the previous two years, and an audit of leave balances was completed, and corrections were made. S1 further stated that Complainant did not point out any errors in a timely manner, but the errors were addressed when reported. He stated that on at least one occasion, Complainant was found to have caused the error.

Regarding claim 4, Complainant stated that on one occasion, he received forms back on the basis that they were incorrectly filled out and had not been entered, but he realized C1 had input them without initialing them. He stated that this error caused him extra work and time on the case because he had to wait for the returns to be processed.

C1 stated that she knew about missed cases, but this involved more than Complainant's cases. She stated that the mere volume of the input of the forms created the opportunity for some to be missed, and it had nothing to do with any particular individual. C1 stated that when Complainant informed her that his cases were not input into AIMS, she immediately looked up the missing entries for him and took corrective action.

S1 stated that this matter was brought to his attention by Complainant and others in the group occasionally throughout the previous several years. He further stated that he investigated the issue at length and found no merit to the accusations. S1 stated that on most occasions in which cases did not correctly process on AIMS, the fault is with the employee recording incorrect codes or other data on the input sheet, and not because of any failure by the Group Secretary. He stated that he found that Complainant had a history of making "many errors" on input sheets.

Regarding claim 5, Complainant stated that on several occasions, he submitted 895 forms but never received them back, while on other occasions, he received the forms within a day or two of closing the case.

C1 stated that when Complainant informed him that 895 forms had not been processed, management sent out an email that instructed employees to do a substitute form 895 and return it to management for processing. C1 further stated that she was not the only person who processed this form.

S1 stated that this is the same matter as the AIMS issue, and he found no merit in Complainant's claim that C1 resisted processing Forms 895 after investigating the allegation. He stated that there are literally thousands of these forms required to be processed within the group annually, and it is a cumbersome task for every member of the group. S1 further stated that the major delays in getting the forms processed are caused by the need for the Group Manager's approval on each of the forms, which creates the same burden on both the Group Manager and the Group Secretary. He stated that it was effectively relayed to most group members that the input of these forms was a heavy burden for the Group Manager and the Group Secretary, and that they needed to minimize errors on these forms to help relieve this heavy burden.

Regarding claim 6, Complainant stated that on July 10, 2014, S1 called her into his office and told him that S1 and upper management were concerned with his working relationship with C1. Complainant further stated that he then told S1 that his relationship with C1 was fine as long as he did not speak to or go near her. Complainant stated that when he asked S1 about C1's aggressive behavior toward him, S1 responded that Complainant was the aggressor according to C1. Complainant stated that he then told S1 he was excusing himself because the meeting was "one sided" and S1 was biased and taking S1's word, and as Complainant stood up, S1 handed him a memorandum. Complainant stated that he did not engage C1 with her bullying behavior; instead, he simply walked away.

S1 stated that the July 2014 advisory memorandum was issued to both Complainant and C1 because of a confrontation they had near C1's workplace, and there had been ongoing complaints from employees about them. S1 further stated that the memo was issued to place both employees on notice that they would need to conduct themselves in a professional manner and failure to do so could result in a decrease in their evaluation rating. S1 also stated that a witness to the altercation (C5) described the incident and reported that Complainant and C1 did not get along.

After 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 but subsequently withdrew his request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision focused on the Agency's liability for the conduct and concluded that the Agency was not liable for the conduct because it took immediate and appropriate corrective action after it learned of the conduct.

CONTENTIONS ON APPEAL

On appeal, Complainant maintains that the Agency's final decision mischaracterized him as "openly gay" although he was not "open at work." Complainant maintains that he never associated with C1 outside of work and only knew of her through mutual friends. However, he also maintains that he saw C1 at a "few alternative establishments in the Fresno area," but he did not offer her any information about his sexual orientation. Complainant contends that he was always courteous to C1 although she targeted him with gay jokes and stereotypes. Complainant also maintains that although other employees had trouble with their leave, C1 quickly remedied their problems, whereas she would put the issues on the backburner for employees who were not her friends. The Agency requests that we affirm its final decision.

STANDARD OF REVIEW

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").

ANALYSIS AND FINDINGS

Harassment by C1

Regarding C1's conduct, in order to establish a claim of hostile-environment harassment, Complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on his 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).

In the case of co-worker harassment, an agency is responsible for acts of harassment in the workplace where the agency (or its agents) knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. See Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999). What is appropriate remedial action will necessarily depend on the particular facts of the case, such as the severity and persistence of the harassment and the effectiveness of any initial remedial steps. See Taylor v. Dep't Of Air Force, EEOC Request No. 05920194 (July 8, 1992).

For purposes of analysis, and without so finding, we assume *arguendo* that Complainant established that he was subjected to harassment because of his sex/sexual orientation and EEO activity. As such, we now review whether Complainant established that the Agency is liable for the alleged harassment he experienced from C1.

In this case, the Agency was not aware of the alleged harassment until Complainant notified S1 of C1's actions in an email on October 6, 2009. The record reveals that immediately after Complainant reported the harassing comments, management began an investigation into the matter by interviewing Complainant, C1, and witness C3. In the meantime, an EEO Counselor was brought in to speak to the group at a meeting to go over EEO guidelines; a Power Point on sexual harassment was presented at a group meeting; the Treasury Inspector General for Tax Administration (TIGTA) spoke to the group at the matter, and the union president was made available for counseling. The record also reveals that on March 3, 2010, C1 was issued a letter of reprimand regarding the comments she made about Complainant's sexual orientation.

There are no allegations or evidence that C1 made any comments about Complainant's sexual orientation after he reported the matter to management on October 6, 2009. As such, we find that the Agency took immediate and appropriate corrective action regarding the comments reported in 2009.

We note that subsequent alleged harassment by C1 occurred in 2014, nearly five years after the sexual orientation comments. C1's antigay comments reported in 2009 are of a different nature than the timekeeping and case/form processing errors Complainant reported in 2014. Thus, we do not find that Complainant's report of harassment in 2009 placed the Agency on notice that C1 was prone to engage in the type of conduct alleged in 2014. Moreover, we note that in response to Complainant's 2014 allegations, the Agency audited leave balances, made corrections where mistakes were made, and investigated reported problems with form processing. Ultimately, the Agency found that timekeeping mistakes and form processing issues were experienced by many employees, and there was no persuasive evidence that Complainant was targeted by C1 regarding these matters. We note that with near unanimity, Complainant's coworkers attest that they also experienced ongoing problems with their timekeeping and case/form processing. Therefore, we conclude that the Agency also took immediate and appropriate corrective action regarding C1's alleged actions in 2014.

Disparate Treatment by S1

With respect to S1's issuance of the memorandum to Complainant, such claims of disparate treatment are examined under the tripartite analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976). For a 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. McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

Once a complainant has established a prima facie case, the burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts to the complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, the complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993); U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715-716 (1983).

In this case, we assume *arguendo* that Complainant established a prima facie case of discrimination for claim 6. Nevertheless, we find that the Agency provided legitimate, nondiscriminatory reasons for its actions. Specifically, S1 stated that the July 2014 advisory memorandum was issued to Complainant and C1 because of a confrontation they had near C1's workplace, and there had been ongoing complaints from employees about both of them. S1 further stated that the memo was issued to place both employees on notice that they would need to conduct themselves in a professional manner and failure to do so could result in a decrease in their evaluation rating. S1 also stated that a witness to the altercation (C5) described the incident and reported that Complainant and C1 did not get along.

In an attempt to prove pretext, Complainant contends that he did not engage C1 in her bullying behavior. However, it is undisputed that management received ongoing complaints about confrontations between Complainant and C1 during the relevant time period. Further, the record reveals that the issuance of essentially the same memorandum to Complainant and C1 was precipitated by a specific altercation between them on April 30, 2014.

We find that Complainant did not prove that the Agency's nondiscriminatory explanation is pretext for unlawful discrimination. Therefore, we find that the Agency properly found that Complainant did not prove that he was subjected to sex discrimination or reprisal regarding claim 6.

CONCLUSION

Accordingly, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision for the reasons set forth in this decision.

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 (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. 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

April 2, 2019

Date