



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

[REDACTED]
Sharon M.,¹
Complainant,

v.

Elaine L. Chao,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 0120180192

Agency No. 2017-27175-FAA-01

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's September 7, 2017, final decision concerning her 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 reasons which follow, the Commission REVERSES the Agency's decision.

ISSUE PRESENTED

Has the Agency established by a preponderance of the evidence that it took immediate and appropriate corrective action where a co-worker subjected Complainant to an unlawfully hostile work environment?

BACKGROUND

At all times relevant to the complaint, Complainant worked as an Air Traffic Control Specialist (ATCS) at the Agency's Buffalo Air Traffic Control Tower in Buffalo, New York.

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.

Complainant initiated EEO Counselor contact on November 22, 2016. Report of Investigation (ROI), Exhibit B1. On February 28, 2017, she filed a discrimination complaint alleging that the Agency discriminated against her on the bases of race (African-American) and color (black) when on November 11, 2016, she received an email from a co-worker (CW), an ATCS who also then-served as the president of her local union. The email contained a racial slur that was used in reference to her because her work identification was “TY.” Specifically, the subject line of the email was “Asshole” and the message stated, in part, as follows:

If TY wasn’t such a Nig who would run an[d] yell racism tomorrow [.] At work. I would love to answer her with this.

Apples an[d] oranges. A coward would only leave a dolly or write on a wall like that (probably someone pro Hillary trying to start shit. If your president won what does stuff prove). A person that would beat/video tape a man being beaten for who they voted for. Something that is everyone’s right. Those people are pieces of shit and hopefully they try that with me so I can gun them down.

(ROI, Exhibit F7).

On November 28, 2016, the Director, National Complaints Team, notified the Air Traffic Manager (Manager), the second-level supervisor of Complainant and CW, that Complainant had initiated a complaint. That same day, the Manager informed CW of Complainant’s allegation of harassment. Management asserted that it began its internal investigation at that time.

In a Notice of Proposed Suspension to CW, dated May 5, 2017, and received by Complainant on May 16, 2017, (ROI, Exhibit F14), the Air Traffic Manager explained that CW would be suspended for 30 consecutive calendar days effective 30 days from the date of CW’s receipt of the notice.² The suspension notice explained that CW was being suspended for having sent an email to Complainant describing her as a “Nig” and threatening violence in the email. The notice informed CW that he was also being suspended for lack of candor because when he was questioned on December 7, 2016, during the internal investigation of the allegation, he was not truthful about the email and he was again evasive during a follow-up internal investigative interview on February 8, 2017. The notice also informed CW that his email violated Standards of Conduct by threatening to commit a violent act which was of grave concern to the Agency. The notice described the email as threatening, intimidating, harassing, abusive, disorderly and disruptive. It also noted that the email exhibited and demonstrated discrimination against another employee based on race and that CW’s expression of racial bigotry was abhorrent, and completely inexcusable.

The Agency began its investigation of the instant EEO complaint on March 28, 2017 and concluded its investigation on May 16, 2017.

² The notice also indicates that CW could reply to the proposed notice of suspension within 15 calendar days of its receipt and full consideration would be given to his reply.

The Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ) or a final decision from the Agency. Complainant requested an Agency decision. In accordance with Complainant's request, the Agency issued a decision pursuant to 29 C.F.R. § 1614.110(b).

In its decision, the Agency found that Complainant was subjected to unwelcome harassment in the form of an email which contained a racial slur. The Agency determined that although the complaint concerned a single incident, because the email came from CW, with whom Complainant previously had a cordial relationship, and because it was intended to be emailed to someone else with whom Complainant works and who apparently had racist views, Complainant had established that the harassment unreasonably interfered with her work environment and created an intimidating, hostile, and offensive work environment.

In so finding, the Agency noted that although a single incident will not generally be regarded as discriminatory harassment, the Commission has recognized that "the use of the racial epithet 'nigger' is a 'highly charged epithet' which 'dredge[s] up the entire history of racial discrimination in this country.'"

The Agency further concluded in its decision that Complainant's claim failed because there was no basis for imputing liability to the Agency. The Agency explained that it took a number of immediate and corrective actions, including investigating the claim, actions taken to keep Complainant and CW separated, and proposing the 30-day suspension. The Agency noted that CW exhibited no similar conduct towards Complainant after the email incident. The Agency also noted that CW no longer held the union position following the incident.³

CONTENTIONS ON APPEAL

Complainant argues that the Agency did not take immediate corrective action and has done nothing to ensure that similar incidents do not recur, noting that she and CW work in the same building, at times on the same shift, and in the same operating quarters. She also argues that the 30-day proposed suspension was not issued until May 2017. She contends that in a Final Determination on the proposed suspension for CW, the suspension was reduced to 14 days, three months after the proposed suspension.⁴

The Agency urges that its decision be upheld. It acknowledges that Complainant met the standard for alleging a hostile work environment based on race and color but argues that the Agency took corrective action to address the claim and that CW had not further engaged in similar incidents against Complainant.

³ CW was apparently removed from his position of local union president and other union positions in November 2016, by the national union following Complainant informing the union about the email.

⁴ The Agency failed to provide the Final Determination on the proposed suspension for the record.

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, (EEO MD-110), at Chap. 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").

Harassment

To establish a claim of harassment a complainant must show that: (1) she belongs to a statutorily protected class; (2) she 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 her 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).

With respect to element (5) 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. EEOC Enforcement Guidance: 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 Erik S. v. Dep't of Homeland Security, EEOC Appeal No. 0120152640 (July 19, 2018), citing Taylor v. Dep't of the Air Force, EEOC Request No. 05920194 (July 8, 1992).

As an initial matter, we note that the Agency acknowledges that Complainant established the first four elements of a claim of harassment. The Agency argues, however, that it is not liable under element (5) because it took immediate and appropriate corrective action.

Agency's Liability

We disagree with the Agency, considering the record as a whole. The Agency asserted that it took immediate and appropriate action once it learned of the alleged harassment. Complainant received the email from CW on November 11, 2016.⁵ She reported the incident to regional union officials on November 11, 2016. The Union Officials indicated that they would remove CW from his union position. However, CW remained as Complainant's coworker.

Complainant initiated contact with an EEO Counselor on November 22, 2016, and an intake interview was conducted on November 25, 2016. ROI, Exhibit B1. The Director of National Complaints Service Team notified the Air Traffic Manager of the allegation on November 28, 2016. ROI, Exhibit F2. It appears that the Agency engaged in an internal investigation. We note however, that the Agency failed to produce the report of the internal investigation within the ROI.

Regarding the Agency's internal investigation, the April 14, 2017 affidavit of the Air Traffic Manager reveals that he and the Rochester Air Traffic Manager conducted an investigation. ROI, Exhibit F2. The two conducted interviews and follow-up interviews with Complainant and CW. Although the record does not contain a copy of the Agency's report of the internal investigation, it appears that Complainant was first interviewed on December 7, 2016, and that she signed her interview statement on December 12, 2016. ROI, Exhibit F11. In his April 21, 2017 affidavit, a Labor and Employee Relations Specialist (Specialist) stated that the investigation was completed. The Specialist also noted that there were discussions in Labor Relations with the Legal Department and that a draft of a notice of proposed action regarding CW's conduct was provided to the Air Traffic Manager, his manager, and the District Manager's office. ROI, Exhibit F4. The record included a copy of the proposed 30-day suspension. There was no copy of the final determination regarding the disciplinary action and no indication within the record that CW was actually disciplined for the harassment. The Agency asserted that the corrective action was effective because no similar incident has occurred since.

However, the Agency is responsible for the hostile work environment unless it shows it took immediate and effective corrective action. Although the Agency took *effective* corrective action, upon review, we find that the Agency's action was not *prompt*. We note that the record clearly indicated that the investigation occurred in early December 2016. The harassment at hand involved a written email sent from CW to Complainant. Complainant indicated that she emailed CW from the original email asking him, "Who sent this to you?" CW replied, "I sent this to you?" He initially lied about the email but later attempted to apologize to Complainant within a week of the exchange. However, based on the acknowledgment of the email by CW and the Union Officials who were aware of the email, an investigation reasonably should not have taken longer than a month to obtain all the relevant information. The Agency did not state how long the internal investigation took and failed to provide a copy of the internal investigation in the ROI for the Commission to determine how long the Agency investigated the matter.

⁵ It appears from the record that CW mistakenly sent the email to Complainant and not to his intended recipient, who was never identified by CW during any of the inquiries into the matter.

Further, the Specialist averred that the investigation had been completed by April 21, 2017 and that management had drafted a disciplinary action. The proposed 30-day suspension was not received by CW until May 16, 2017, nearly a month after it was allegedly drafted. There is no reason given for the delay. In addition, it appears that the Agency took over six months to issue the proposed disciplinary action. Based on the events of this case, we find that six months is not prompt. See Isidro A. v. U.S. Postal Serv., EEOC Appeal No. 0120182263 (Oct. 16, 2018) (finding that the Agency failed to take prompt and effective action when it investigated a single utterance of the word “nigger” in the workplace on July 15, 2017 and issued disciplinary action on November 21, 2017). As such, we conclude the Agency failed to take prompt action after learning of the harassment. Because the Agency failed to meet its affirmative defense burden, we find that it is liable for CW’s actions and reverse the Agency’s determination of no discrimination as to Complainant’s claim of harassment.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed or referenced herein, we REVERSE the Agency’s decision and REMAND the matter in accordance with the ORDER below.

ORDER

The Agency is ORDERED to take the following remedial action:

- I. Within fifteen (15) calendar days of the date this decision is issued, the Agency shall give Complainant notice of her right to submit objective evidence (pursuant to the guidance given in Carle v. Dep’t. of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of her claim for compensatory damages. Complainant shall have forty-five (45) calendar days from the date the Complainant receives the Agency’s notice to submit her compensatory damages evidence. The Agency shall complete the investigation on the claim for compensatory damages within forty-five (45) calendar days of the date the Agency receives Complainant’s claim for compensatory damages. Thereafter, the Agency shall process the claim in accordance with 29 C.F.R. § 1614.110. Within thirty (30) calendar days of determining the amount of compensatory damages due Complainant, the Agency shall pay that amount to Complainant.
- II. The Agency is directed to conduct eight (8) hours of in-person or interactive training for management, particularly regarding recognizing a hostile work environment and addressing management’s responsibilities with respect to eliminating harassment in the workplace. The Agency shall conduct the training within ninety (90) days from the date the decision is issued.
- III. The Agency is directed to conduct four (4) hours of in-person or interactive training for all members of the workforce at the Air Traffic Control Tower in Buffalo, New York,

regarding anti-harassment. The Agency shall conduct the training within ninety (90) days from the date the decision is issued.

- IV. The Agency is directed to conduct eight (8) hours of in-person or interactive training for CW regarding hostile work environment in the workplace. The Agency shall conduct the training within ninety (90) days from the date the decision is issued.
- V. Within thirty (30) days from the date the decision is issued, the Agency shall reconsider its final disciplinary action issued against CW. The Agency shall report the original discipline issued and its reconsidered decision. The Agency shall inform the Commission of its decision to modify the disciplinary action issued to CW. If the Agency chooses not to change its final determination regarding disciplinary action shall set forth the reason(s) for its decision not to impose any additional disciplinary action.
- VI. The Agency shall, within thirty (30) days of the date this decision is issued, post a notice in accordance with the Order 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). The report shall include supporting documentation, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Air Traffic Control Tower in Buffalo, New York, 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).

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 (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 25, 2019

Date