



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

████████████████████
Cecille W.,¹
Complainant,

v.

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

Appeal No. 0120181765

Hearing No. 471-2013-00121X

Agency No. 200J-0553-2013-10072

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 March 27, 2018 final order concerning an 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

During the period at issue, Complainant worked as a Food Service Worker Patient Specialist at the Agency's facility in Detroit, Michigan.

Complainant contacted an EEO Counselor and filed a formal EEO complaint on February 25, 2013, alleging that the Agency discriminated against her based on race (African-American), sex (female), age, and in reprisal for prior protected 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.

After an investigation, Complainant was provided a copy of the investigative file and requested a hearing before an EEOC Administrative Judge (AJ). The Agency filed a Motion for Summary Judgment on February 28, 2014. Complainant filed a response on March 7, 2014. On March 5, 2018, the AJ issued a decision by summary judgment in favor of the Agency finding no discrimination was established.

In her decision, the AJ framed the claims in the following fashion:

1. On July 11, 2011, [a named supervisor (“S1”)] stated to her, “you always give everyone a hug, but you don’t give me a hug when I have been giving you all this overtime.”
2. On June 15, 2012, a co-worker [“C1”] put his hands on her buttocks and grabbed it twice.
3. On June 25, 2012, she had a verbal altercation with a co-worker [“C2”] who yelled and screamed at her.
4. On July 23, 2012, Complainant was yelled at by [C1];
5. On July 23, 2012 [Complainant’s second-level supervisor (“S2”)] told her, “that’s why we don’t like hiring women because they are too emotional” and “I hope I don’t regret...hiring you.”
6. On July 28, 2012, a manager yelled and screamed at her.
7. On November 16, 2012, [C2] came to her work area and approached her in a threatening and hostile manner.
8. On December 12, 2012, she requested copies of Reports of Contact she submitted to management. However, to date, she has not received the documents.
9. On January 8, 2013, a manager yelled and screamed at and talked down to her.
10. On March 15, 2013, the Service Chief (“S3”) changed the Complainant’s duty location and ordered her to work in the kitchen.

AJ Decision at 2.

The AJ found that Complainant’s claim of a hostile work environment could not be sustained based on race, sex and/or age because Complainant did not present any evidence that the alleged actions were based on these protected classes. AJ Decision at 9. Regarding the basis of reprisal, the AJ found that this claim failed because the Complainant never engaged in EEO activity.

AJ Decision at 11. Regarding the sexual harassment claim, the AJ stated that there were two alleged incidents of sexual harassment:

[the] first when supervisor [S1] made the hugging comment to the Complainant [incident (1)] and the second, when [C1] grabbed her buttock. It's questionable whether these two events would meet the severe or pervasive threshold to constitute a hostile work environment based on sexual harassment. Regardless, the Agency took prompt remedial action [upon] learning of those allegations. For example, with regard to [incident (1)], management asked [S1] if he made the comment and he admitted that he had done so. [S1] received a written reprimand and was required to attend EEO classes...[Regarding incident (2)], Complainant made a formal allegation that [C1] sexually harassed her in her EEO complaint. [S3] was made aware of this allegation during a mediation session. [S3] then conducted an immediate investigation of the matter by interviewing Complainant and [C1]. [C1] denied the conduct and neither party had supporting witnesses. The investigation was inconclusive but [S3] reminded [C1] of the sexual harassment policy and provided him a copy of it. The Agency took prompt, remedial action regarding both incidents. AJ Decision at 10-11.

The Agency's March 27, 2018 final action implemented the AJ's decision.

The instant appeal followed. On appeal, Complainant asserts that AJ's summary judgment decision is improper. Complainant states that "[S2] failed to report information provided to him by Complainant regarding [C1] sexually assaulting her. [Agency] policy states that all supervisors must take immediate and appropriate action upon receipt of [sexual harassment claims]." Complainant's Brief in Support of Appeal.

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 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 Chapter 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").

ANALYSIS AND FINDINGS

We must determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of 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 fact is "material" if it has the potential to affect the outcome of the case.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003).

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrener, 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).

As an initial matter, we concur with the AJ with respect to granting summary judgment on the bases of race and age because Complainant has failed to present evidence that the alleged incidents were motivated by these protected classes. However, as set forth below, we find there are genuine issues of material fact in dispute with respect to Complainant's claims on the bases of sex and reprisal for prior protected activity. The record warrants further development and requires credibility determinations with respect to these claims.

Sexual Harassment (Incident (2))

In order to establish a prima facie case of sexual harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a

statutorily protected class; (2) that she was subjected to unwelcome conduct related to her sex; (3) that the harassment complained of was based on her sex; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982). 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 (March 8, 1994).

Regarding claim (2), the allegation of an unwelcomed touching by C1, the AJ found that this incident might not be sufficiently severe to constitute harassment. Complainant alleges that C1 grabbed her buttocks twice. The Commission has stated that “unless the conduct is quite severe, a single incident or isolated incidents of offensive conduct or remarks generally do not create an abusive environment.” The Commission has further stated that “the Commission will presume unwelcome, intentional touching of a Complainant’s intimate body area is sufficiently offensive to alter the condition of her working environment and constitute a violation of Title VII.” See Policy Guidance on Current Issues of Sexual Harassment [hereinafter Guidance on Sexual Harassment], EEOC Notice No. N-915-050 (March 19, 1990); see also Hayes v. U.S. Postal Serv., EEOC Appeal No. 01954703 (Jan. 23, 1998) (finding that complainant was subjected to unlawful sexual harassment based on one incident, a coworker sticking his tongue into complainant’s ear), req. for recons. den., EEOC Request No. 05980372 (June 17, 1999); Policy Guidance on Sexual Harassment at n.24 (sexual harassment found where harasser slid his hand under the charging party’s skirt and squeezed her buttocks).

We further find that the record warrants further development regarding whether the Agency took prompt corrective action with respect to claim (2). The AJ found the Service Chief (S3) conducted an investigation when she became aware of alleged incident (2) in mediation. The record reflects that S3 conducted an investigation in January 2013.² ROI at 379. However, the record reflects that Complainant first told her second-level supervisor (S2) about C1’s alleged conduct set forth in incident (2) in *July 2012* (more than *five months* before S3 conducted her investigation). ROI at 296, 353. The record does not reflect that S2 conducted an investigation at this time. In her affidavit, S3 asserts that “[S2] was aware of it and he indicated that when she came to him, he recommended that she go to EEO...[S2] did not pursue it. He requested that she pursue it. She asked him not to. And like I said, I became aware in mediation and I immediately started an investigation [regardless] to whether she wanted me to or not.” Report of Investigation at 380.

Commission guidance provides, in pertinent part, that “[a] conflict between an employee’s desire for confidentiality and the employer’s duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to employer liability.

² We note that during S3’s investigation of incident (2), C1 denied touching Complainant. ROI at 556.

While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment... As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. If a fact-finding is necessary, it should be launched *immediately* [emphasis added].” EEOC’s Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999); see also Complainant v. Dep’t of Def., EEOC Appeal No. 0120130331 (May 29, 2015) (finding that a 21-day delay by agency management in speaking with an alleged sexual harasser constitutes a failure to act promptly to address harassment); Rockymore v. U.S. Postal Serv., EEOC Appeal No. 0120110311 (Jan 31, 2012) (finding that a two week delay in responding to notification of harassment that included an allegation of physical touching showed that the Agency failed to take prompt corrective action). Here, we find that S2 had a duty to immediately investigate Complainant’s sexual harassment claim once it was reported to him in July 2012, even if she did not want to formally file a complaint at that time. S2 had Complainant’s verbal statement regarding incident (2). Thus, S2 could have followed up with C1 at that time regarding Complainant’s allegation.

We further note the record reflects that there was some type of investigation by the Administrative Investigation Board (AIB). The record, however, does not contain documents related to the actual AIB investigation. Thus, we are unable to determine whether this could constitute a prompt, thorough response by the Agency with respect to incident (2). However, the record contains an affidavit by Chief, Clinical Operations indicating that the AIB pertained to the overall work environment of Complainant’s department rather than Complainant’s specific claims. ROI at 434. Specifically, the Chief asserts that, “[Complainant] was one of 15 witnesses from Food and Nutrition Service called to testify in an AIB regarding the work environment in that service. [Complainant] was made aware numerous times...that the AIB was regarding the environment in food and nutrition services as a whole and was not specific to her or any complaints/allegations.” Id. Thus, it does not appear based on the record before us that the AIB was an investigation pertaining to incident (2).

Complainant also alleges that on the same day that she informed S2 of C1’s alleged touching, S2 stated to her, “that’s why we don’t like hiring women because they are too emotional and “I hope I don’t regret...hiring you.” ROI at 304. S2 states that he did not make this exact statement but appears to allege that he made some statement to Complainant regarding her complaints. Specifically, he states in response to whether he made the statement at issue, “No, I did not. This was taken out of context. I made a statement that...this is becoming troublesome. They were constantly having these complaints, and I told her that I hope that ...we don’t continue to have all these situations.” ROI at 357. In a report of contact on this matter dated January 3, 2013, S3 stated, “[S2] does not recall saying those exact words to her especially being a supervisor responsible for recruitment and enforcing EEO regulations.” ROI at 572. The record warrants further development regarding S2’s alleged statement to Complainant after she informed him of C1’s alleged unwelcomed physical touching.

Regarding Complainant's reprisal claim, the AJ, in her decision, found that Complainant never engaged in protected activity. However, the record reflects that in 2011, prior to many of the incidents at issue, Complainant opposed the alleged hostile work environment and informed Agency management, specifically S3. ROI at 551. In a letter to management, dated May 13, 2011, Complainant stated that she rejected the advancements of S1 and felt she was in a hostile work environment. ROI at 550. Reporting sex discrimination or a sexually hostile work environment constitutes protected activity. EEOC's Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, II,A(2) (Aug. 25, 2016). Thus, we find Complainant's correspondence to the Agency in May 2011 constituted protected opposition.

The hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 7-1 (Aug. 5, 2015); see also 29 C.F.R. § 1614.109(e). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims." Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (March 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (October 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995). In summary, there are simply too many unresolved issues which require an assessment as to the credibility and further development of the record. Therefore, judgment as a matter of law for the Agency should not have been granted with respect to Complainant's sexual harassment/sex discrimination and retaliation claims. While this decision focuses primarily on incident (2) and why this alleged incident was not appropriate for summary judgment, we remand the other claims set forth herein with respect to the bases of sex and reprisal, so as not to fragment Complainant's complaint.

Accordingly, we AFFIRM the Agency's final order implementing the AJ's decision without a hearing with respect to the bases of race and age. However, we REVERSE the Agency's final order implementing the AJ's decision without a hearing with respect to the bases of sex and reprisal and we REMAND these claims to the Agency in accordance with the ORDER below.

ORDER

The Agency is directed to submit a request for a hearing, a copy of the complaint file, and a copy of this decision, to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. 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 hold a hearing and issue a decision on the complaint 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 (T0610)

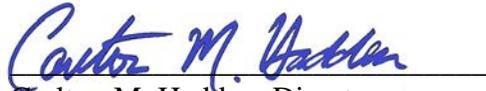
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

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

The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

August 22, 2019

Date