



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

[REDACTED]
Irina T.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service,
(Northeast Area)
Agency.

Appeal No. 0120181844

Hearing No. 510-2015-00450X

Agency No. 1B-007-0010-15

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 April 12, 2018, final order 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 following reasons, the Commission VACATES the Agency's final order, and REMANDS the complaint for further processing.

ISSUE PRESENTED

The issue is whether the Administrative Judge properly issued a decision without a hearing finding that Complainant had not established that the Agency discriminated against her based on her sex, or in reprisal for prior EEO activity, when it allegedly did not provide an appropriate space to express breast milk; or when it confiscated a beeper from Complainant's husband, directed her husband off the premises, and conducted a pre-disciplinary interview.

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 Postal Support Employee Mail Processing Clerk at the Agency's Detail Mail Distribution Unit, Catano Annex, in Catano, Puerto Rico.

On February 11, 2015, Complainant informed the Union Steward (US) that she needed a place to express breast milk. On February 13, 2015, US discussed the matter with Complainant's first-line supervisor (S1) (female). On February 14, 2015, S1 informed Complainant that she could use US's office during the week, and a different office on the weekends. On February 15, 2015, Complainant stated that S1 spoke with the Manager of Distribution Operations (MDO) (female), who stated that the Agency did not have to provide a place to express breast milk and that Complainant should use the restroom. Complainant filed a grievance on the matter. Report of Investigation (ROI) at 58.

On February 26, 2015, a coworker (CW) was making photocopies in US's office. CW left for a short period of time and, when he returned, he found Complainant in the office, with her back to him. CW was surprised to see Complainant and quickly closed the door. Complainant stated that, after this incident, she used the restroom to express breast milk. ROI at 59, 99.

On March 4, 2015, MDO saw an unaccompanied child in the building and asked how he got in; the child pointed to a car in the parking lot. MDO asked the man in the car to identify himself, and he responded that he was Complainant's husband. When MDO asked how he got into the parking lot, he stated that Complainant gave him her beeper. MDO confiscated the beeper and asked Complainant's husband to leave the premises. MDO noted that Complainant was not in the building at the time of this incident. ROI at 125, 135-6. On March 8, 2015, S1 conducted a pre-disciplinary interview with Complainant. During the interview, Complainant stated that the beeper was in the car that she shares with her husband. Complainant did not respond when asked if she was aware that she allowed an unauthorized individual to gain access to the parking lot. Complainant was not issued any discipline for this incident. ROI at 150, 80-1.

On March 7, 2015, the Agency settled Complainant's grievance and agreed to provide two 30-minute breaks and a clean office, free from intrusion, to express breast milk. ROI at 87. On June 11, 2015, Complainant found the designated office filled with boxes. S1 explained that new managers were unaware that Complainant was using the office, and once informed, they identified an alternative office while the designated office was cleaned and painted. ROI at 170-1.

On May 5, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female, pregnancy), and in reprisal for prior protected EEO activity under Title VII when:

1. since February 13, 2015, she was not provided with a reasonable amount of time and a private, sanitary area to express breast milk; and
2. on March 4, 2015, MDO took away her beeper, kicked her husband out of the employee parking lot, and informed her that she would receive a pre-disciplinary interview.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. On June 3, 2016, the Agency filed a Motion for a Decision Without a Hearing, and Complainant replied to the motion on June 20, 2016.

On October 13, 2017, the Chief Administrative Judge (CAJ) notified the parties that the complaint would be held in abeyance until January 9, 2018, due to the effects of Hurricane Maria. CAJ informed them that, if either party believed that the case should be held in abeyance beyond January 9, 2018, it was to file a motion showing good cause; otherwise, the processing of the complaint would resume on January 10, 2018.²

On April 4, 2018, the AJ issued a decision without a hearing. The AJ determined that Complainant had not established a prima facie case of discrimination based on sex, or in reprisal for prior EEO activity, for claim 1 because she was not aggrieved because the Agency granted her request for a private room to express breast milk. The AJ noted that the incident with CW was an accidental and isolated event.

For claim 2, the AJ found that Complainant had not established a prima facie case of discrimination based on sex, or in reprisal for prior EEO activity, because there was no evidence that the Agency acted improperly when it asked Complainant's husband to relinquish the beeper and leave the employee parking lot. The AJ also noted that the fact that Complainant was subjected to a pre-disciplinary interview did not render her aggrieved because the Agency did not subsequently subject her to a personnel action.

The AJ assumed, for the purposes of the decision, that Complainant established a prima facie case of reprisal discrimination when she was subjected to a pre-disciplinary interview and found that the Agency articulated a legitimate, nondiscriminatory reason for its action. Specifically, Complainant improperly gave her beeper to her husband to access the employee parking lot. The AJ then found that Complainant had not shown that the reason was pretext for discrimination, and she had not offered an explanation why it would be proper for an employee to share a beeper with a non-employee to gain access to the Agency's employee parking lot.

² There is no indication that either party requested an extension of the abeyance.

The AJ concluded that Complainant was not discriminated against based on her sex, or in reprisal for prior EEO activity. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

Complainant filed the instant appeal and submitted a statement in support of her appeal. As an initial matter, Complainant states that she did not receive the AJ's decision, and that she only received the Agency's final order adopting the AJ's decision. Complainant asserts that the administrative judge in her case was the Chief AJ (CAJ), not the AJ.³

Complainant argues that the Agency changed her shift, against her will.⁴ Complainant alleges that S1 informed US that there was "no place" for Complainant to express breast milk because she was a federal employee, and that she needed to use the restroom to express breast milk. Complainant states that, when the Agency provided a private space for her to use, it was filled with dust and boxes. Additionally, Complainant argues that management officials did not treat other employees' family members the same way as they treated her husband. Complainant states that she was given a pre-disciplinary interview, without any prior warning that no family member could pick her up from work.

The Agency did not submit a statement in response to Complainant's appeal.

ANALYSIS AND FINDINGS

EEOC regulations state that an AJ shall issue a decision and send copies to the parties, and agencies are to issue final orders within forty (40) days of receipt of an AJ's decision. See 29 C.F.R. §§ 1614.109(l), and 1614.110(a). In this case, Complainant states that she did not receive a copy of the AJ's decision without a hearing, and only received the Agency's final order fully adopting the AJ's decision. The record shows that the AJ certified that on April 4, 2018, a copy of the decision was mailed to Complainant's address of record via first class mail, and that Complainant's address of record has remained the same throughout the duration of her complaint. While it is not clear why Complainant did not receive a copy of the AJ's decision, we note that mail service in Puerto Rico was disrupted after Hurricane Maria hit the island in September 2017.

³ It is not clear why the CAJ issued the memo notifying the parties of the abeyance. However, the record shows that the AJ was assigned to this case since May 24, 2016.

⁴ We note that this claim was previously adjudicated in a separate EEO complaint, Irina T. v. U.S. Postal Serv., EEOC Appeal No. 0120180106 (June 19, 2018), request for reconsideration denied, Irina T. v. U.S. Postal Serv., EEOC Request No. 0520180507 (Oct. 5, 2018).

Since Complainant did not receive a copy of the AJ's decision, we find that an important step in the EEO process is inadvertently missing. Without a copy of the AJ's decision, on appeal Complainant was unable to argue with specificity about the findings and conclusions of the AJ, which the Agency implemented. As such, we VACATE the Agency's final order fully adopting the AJ's decision, and ORDER the Agency to reissue its final order, in accordance with the order below.

CONCLUSION

We find that Complainant was inadvertently deprived of a copy of the AJ's decision, which the Agency fully adopted. Therefore, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the Agency's final order and REMAND the matter back to the Agency for additional action, in accordance with the ORDER below.

ORDER

Within thirty (30) days of the date of issuance of this decision, the Agency is ordered to: (1) issue a new final order with appeal rights to the Commission and; (2) mail the new final order, with a copy of the AJ's decision without a hearing, to Complainant at her address of record.

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)

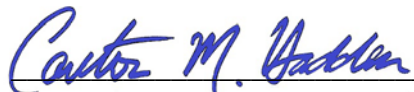
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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 10, 2019

Date