



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

[REDACTED]
Gabriele G.,¹
Complainant,

v.

Andrew M. Saul,
Commissioner,
Social Security Administration,
Agency.

Appeal No. 0720180015
Hearing No. 520-2016-00382X
Agency No. BOS-15-0214-SSA

DECISION

Following its January 22, 2018, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. For the following reasons, the Commission MODIFIES the Agency's final order, and REMANDS the matter to the Agency for further processing in accordance with the Order below.

ISSUES PRESENTED

The issues presented are whether the AJ's finding that Complainant was subjected to a hostile work environment on the bases of age and reprisal for prior EEO activity when beginning in October 2014, she was issued a lowered performance evaluation, subjected to false allegations, and subjected to unfair terms and conditions of employment, is supported by substantial evidence in the record; and whether various aspects of the remedy provided by the AJ were appropriate.

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 Supplemental Security Income Claims Representative at the Agency's Presque Isle Field Office facility in Presque Isle, Maine. The record indicates that all Agency employees received an annual performance evaluation (PACS appraisal) where they were rated on the following elements: (1) Interpersonal Skills; (2) Participation; (3) Demonstrates Job Knowledge; and (4) Achieves Business Results. Employees received a rating of 1 (Not Successful), 3 (successful contribution, or 5 (outstanding contribution). The scores from each element were combined and employees received an average score. PACS scores do not carry over from year to year. Over the course of fiscal years 2012 – 2014, Complainant received the following PACS scores:

	Interpersonal Skills	Participation	Demonstrates Job Knowledge	Achieves Business Results	Overall Element Average
FY 2012	5	5	5	5	5.0
FY 2013	5	3	5	3	4.0
FY 2014	5	3	5	5	4.5

In the fall of 2014, Complainant was providing mentor/training support on the Supplemental Security Income (SSI) program. Complainant and three other employees participated in regular mentor meetings. The meetings were never used for disciplinary purposes but were used to provide a place to monitor a mentee's progress and to discuss training scenarios. In October 2014, Complainant's mentee incorrectly processed an SSI claim. In a conference about the incorrectly processed claim, Complainant's mentee alleged that she asked Complainant for assistance processing the claim because it involved an unusual issue, and that she processed the claim in accordance with the advice Complainant offered. Complainant maintained that she never discussed the claim with the Mentee and maintained that she was incorrectly accused of providing incorrect information regarding the claim.

On or about December 1, 2014, Complainant alleged that the District Manager unlocked her file cabinet and moved her EEO file folder. Complainant was not present for these alleged events and admits that she never saw the District Manager move the folder. The District Manager asserts that she opened the drawer to associate Complainant's mail so that she did not return to the office with a pile of work. She also accessed the drawer in search of a specific SSI form.

On or around December 30, 2014, Complainant was accused of illegally processing a claim. A meeting was scheduled and held to discuss the specifics of Complainant's alleged failure to follow the proper procedures for processing several SSI claims. Complainant was alleged to have paid claims on incomplete applications and deleted incomplete redeterminations.

Finally, Complainant alleged that in January 2015, the District Manager “ordered” her to move her car in the field office parking lot, but that a few weeks later management asked all employees to park in the lot in the order in which they arrived at work to maximize space in the lot during the winter months.

On March 30, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her as articulated above. At the conclusion of the investigation, 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. Complainant timely requested a hearing and the AJ held a hearing that began on October 19, 2017 and ended on October 27, 2017. The AJ issued a bench decision on October 27, 2017, finding that Complainant established that she was subjected to discrimination as alleged. The AJ reasoned that Complainant demonstrated that the Agency’s conduct was sufficiently pervasive enough to alter the conditions of employment and to create a work environment that a reasonable person would find hostile or abusive. The Agency subsequently issued a final order rejecting the AJ’s finding that Complainant proved that the Agency subjected her to discrimination as alleged and filed the instant appeal. The Agency also rejected the AJ’s remedy.

CONTENTIONS ON APPEAL

On appeal, the Agency seeks reversal of the AJ’s decision, and argues that the decision contains material errors of fact and law. The Agency contends that the entire foundation of the events of the instant case Complainant cites as giving rise to her hostile work environment claim, are both “legally infirm” and not supported by a preponderance of evidence. The Agency maintains that Complainant’s testimony was based on speculation, and that the AJ’s credibility findings are vague and not supported by the evidence of record. Specifically, the Agency argues that: (1) the AJ erred in failing to dismiss the complaint for mootness; (2) Complainant failed to meet her burden of proof to support a finding of liability; (3) the AJ improperly prejudiced the Agency by admitting and relying upon factual allegations that were not accepted for investigation; (4) the AJ improperly assumed an advocacy role on Complainant’s behalf; and (5) the AJ exceeded her regulatory authority by ordering the Agency to post a notice to employees at facilities other than where the alleged discriminatory conduct occurred. In the event the Commission declines to reverse the AJ’s finding of discrimination, the Agency argues that the Commission should, among other things, modify the AJ’s order with respect to the notice posting and discipline.

Complainant did not submit a statement on appeal.

STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted).

A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held. An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

ANALYSIS AND FINDINGS

Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VI.C (Aug. 5, 2015) provides that on appeal to the Commission, the burden is squarely on the party challenging the AJ's decision to demonstrate that the AJ's factual determinations are not supported by substantial evidence. See id. In this case, this means that the Agency has the burden of pointing out where and why the AJ's findings are not supported by substantial evidence. Cf. id. (pointing out that "[t]he appeals statements of the parties, both supporting and opposing the [AJ's] decision, are vital in focusing the inquiry on appeal so that it can be determined whether the [AJ's] factual determinations are supported by substantial evidence").

According to the Agency, Complainant voluntarily retired on March 31, 2017, and that because of her voluntary retirement from the Agency, the alleged discriminatory environment has ended; thus, there is no reasonable expectation that the violation will recur, and any effects of the discrimination have been completely eradicated. See County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). The Agency further noted that the only damages sought by Complainant were compensatory damages, which the AJ found were precluded by the ADEA. We disagree with the Agency's first contention, i.e., that the AJ erred in failing to dismiss the complaint for mootness. Like the AJ, we find that there is still relief that is available to Complainant in the form of declaratory relief in the form of the finding of discrimination. Moreover, we note the Commission's interest in addressing proven discrimination in the workplace through remedial measures. Consequently, we do not find that the effects of the discrimination have been completely eradicated.

With respect to the Agency's second contention that Complainant failed to meet her burden of proof to support a finding of liability, we find substantial evidence in the record to support the AJ's finding that the conduct alleged in the instant matter was shown to be sufficiently severe and pervasive enough to alter the conditions of employment, and that it did create an environment that a reasonable person would find hostile and abusive. The AJ examined the entire working environment when forming her conclusion that Complainant was subjected to a hostile work environment. The AJ also relied on credibility determinations that were based on the demeanor of witnesses.

We find no merit with the Agency's third contention that the AJ improperly prejudiced it by admitting and relying upon factual allegations that were not accepted for investigation. The AJ noted that:

I understand that the Agency, I believe, argued that some of the incidents were not known prior to the hearing and so I guess that implies that the Agency was unable to defend itself against some of those incidents because it was not prepared in terms of knowing which incident would be discussed under the hostile work environment, the totality of the circumstances and the environment.

Hearing Transcript at p. 431.

The AJ, however, noted that:

[t]he Agency has full access to the ROI and to all of the -- the witnesses who testified in this case. And, therefore, I find that there is no prejudice to the Agency when all of the situations, including a job for which Complainant was not considered, a technical expert job, and in terms of her considering retirement and retiring early, all of those things -- I believe that the Agency is not prejudiced when we're considering the hostile work environment and all of the testimony that has gone on regarding that environment by not only the complainant, but also by her witness. . . .

Id.

The Commission notes that AJ's have broad discretion in the conduct of hearings, including discovery, and the determination of whether to admit evidence, or permit or compel the testimony of witnesses. See 29 C.F.R. § 109. Upon review of the record, the Commission finds no persuasive evidence that the AJ abused her discretion in these matters. In this regard, we note that allegations of a hostile work environment are examined by reviewing the totality of the evidence. We also note that the AJ only found liability on the matters raised in Complainant's EEO complaint, not the matters that were essentially used as background evidence.

Regarding the Agency's fourth contention, i.e., the AJ improperly assumed an advocacy role on Complainant's behalf, we find that nothing in the record demonstrates that the AJ abused her discretion and assumed an advocacy role on Complainant's behalf. As noted above, an Administrative Judge has full responsibility for the adjudication of the complaint, including overseeing the development of the record, and have broad discretion in the conduct of hearings. 29 C.F.R. § 1614.109(a)(e). Given the AJ's broad authority to regulate the conduct of a hearing, a party claiming that the AJ abused his or her discretion faces a very high bar. Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016) citing Kenyatta S. v. Dept. of Justice, EEOC Appeal No. 0720150016 n.3 (June 2, 2016) (responsibility for adjudicating complaints pursuant to 29 C.F.R. § 1614.109(e) gives AJ's wide latitude in directing terms, conduct, and course of administrative hearings before EEOC). We find that the Agency failed to meet its burden in the instant matter.

Finally, we note the Agency's fifth and final contention, i.e., the AJ exceeded her regulatory authority by ordering the Agency to post a notice to employees at facilities other than where the discriminatory conduct occurred. In her bench decision, the AJ ordered that a notice be posted at facility where Complainant worked, Presque Isle, Maine, and the facility where one of the responsible management officials was currently located, which the Agency later identified as its Fort Walton Beach, Florida field office. Subsequently, the AJ, in her Order and Submissions to Bench Decision, also provided that the notice should also "be posted and sent electronically to all employees in the Operations Field Offices within the Maine District."

The Agency correctly asserts that 29 C.F.R. § 1614.501(a)(1) usually requires that the Notice only be posted at "the affected facility." However, on a case-by-case basis, there may be justification for ordering posting on a wider basis. However, in this case, the AJ has not explained her reasons for ordering the wider posting. Therefore, we will MODIFY the AJ's Order so that the Notice need only be posted at the Agency's Presque Isle, Maine facility where the discrimination took place. See Mohar v. USPS, EEOC Appeal No. 0720100019 (Aug. 29, 2011).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final order, and REMAND the matter to the Agency for further processing in accordance with this decision and the Order below.

ORDER

To the extent that it has not already done so, within one hundred twenty (120) days of the date of this decision, the Agency shall:

1. Consider issuing discipline to the two responsible management officials, i.e., the then District Manager, and the Operations Supervisor. The Agency shall report its decision to the Compliance Officer referenced herein. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the identified management officials have left the Agency's employment, the Agency shall furnish documentation of the departure date(s).
2. Ensure that the two responsible management officials participate in 8 hours of in-person training on their obligations, responsibilities, and rights under the ADEA. Specifically, training should focus on not discriminating against employees because they have engaged in prior protected EEO activity.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Presque Isle Field Office, located in Presque Isle, Maine, 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 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)

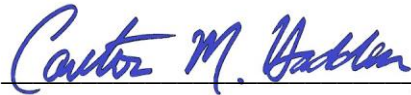
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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

November 15, 2019

Date