EEOC DOC 0120122332 (E.E.O.C.), 2012 WL 5178399

U.S. Equal Employment Opportunity Commission (E.E.O.C.)

Office of Federal Operations

RITA P. LASSITER, COMPLAINANT,

v.

JOHN M. MCHUGH, SECRETARY, DEPARTMENT OF THE ARMY, AGENCY.

Appeal No. 0120122332
Hearing No. 451-2011-00161X
Agency No. ARFTSAN09DEC05711
October 10, 2012

DECISION

***1** On May 18, 2012, Complainant filed an appeal from the Agency's April 30, 2012, 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. The Commission deems the appeal timely and accepts it pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission AFFIRMS the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Management Assistant, GS-05, in the Human Resources and Administrative Division, Records Management Branch, at the Agency's Fort Sam Houston facility in San Antonio, Texas.

On January 29, 2010, [1] Complainant filed an EEO complaint alleging that the Agency subjected her to harassment on the bases of race (African-American), sex (female), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. On August 18, 2010, Complainant's supervisor tailgated her in her car;
2. On August 17, 2010, Complainant's supervisor physically assaulted her at her desk;
3. On January 28, 2010, her supervisor denied Complainant appropriate training to complete other duties assigned to her;
4. On January 20, 2010, Complainant's supervisor requested a leave slip from Complainant because she took too long in the ladies room;
5. On January 13, 2010, Complainant's supervisor denied her request for supplies that would assist her in accomplishing her tasks more efficiently, yet she approved a male coworkers request for the same supplies;
6. On December 3, 2009, Complainant was issued a 3 day suspension to be effective January 5-7, 2010;
7. On August 17, 2009 through August 20, 2009, her supervisor did not inform Complainant of training and/or organizational functions within her department;
8. On August 19, 2009, her supervisor yelled at Complainant in the presence of a soldier while she was assisting him;
9. On August 6, 2009, while on the phone with a customer, Complainant's supervisor asked if it was a personal call and told her not to be on the telephone;
10. On August 5, 2009, Complainant's supervisor yelled at her and told her to work at her desk;
11. On June 26, 2009, through June 30, 2009, Complainant's supervisor took her work logs and original files from Complainant's desk without her knowledge;

12. In March 2009, Complainant's supervisor tampered with her desk drawers, took some documents from her desk without informing her, and left her desk in disarray;

***2** 13. From March 23, 2009 to present, Complainant's supervisor requires her to submit five different reports to her while other employees in her department are not required to do so;

14. From February 10, 2009 to present, Complainant is the only employee required to submit a transmittal sheet to the Finance Office that have to be dated and timed; and

15. From February 2, 2009 to present. Complainant is the only employee in her department required by her supervisor to process military orders.

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 (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's July 18, 2011, motion for a decision without a hearing and issued a decision without a hearing on March 22, 2012. The AJ found that Complainant failed to establish that she was subjected to discrimination as alleged. 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

On appeal, Complainant contends that a summary judgment decision was not appropriate because genuine issues of material fact exist. Complainant contends that the allegations are severe or pervasive enough to constitute harassment, and that the harassment was because of her race, sex, and her prior protected EEO activity. In opposition to the appeal, the Agency asserts that summary judgment was appropriate. Additionally, the Agency asserts that Complainant failed to establish a prima facie case of a hostile work environment.

ANALYSIS AND FINDINGS

Summary Judgment

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, at Chapter 9, § VLB. (November 9, 1999) (providing that both the Administrative Judge's determination to issue a decision without a hearing, and the decision itself, are subject to de novo review). 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").

***3** We must first 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. nderson 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 "geuuine" 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). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." Anderson, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an administrative judge could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing)

***4** After a careful review of the record we find that the AJ's issuance of a decision without a hearing was appropriate as no genuine issue of material fact exists. The record has been adequately developed, Complainant was given notice of the Agency's motion to issue a decision without a hearing, she was given an opportunity to respond to the motion, she was given a comprehensive statement of undisputed facts, and she had the opportunity to engage in discovery. Further, even if we assume all facts in favor of Complainant, a reasonable fact finder could not find in Complainant's favor, as explained below.

Harassment

Harassment of an employee that would not occur but for the employee's race, color, sex, national origin, age, disability, religion or prior EEO activity is unlawful, if it is sufficiently patterned or pervasive. Wibstad v. United States Postal Service, EEOC Appeal No. 01972699 (Aug. 14, 1998) (citing McKinney v. Dole. 765 F.2d 1129, 1138-39 (D.C. Cir. 1985)); EEOC Enforcement Guidance on Harris v. Forklift Systems, Inc. at 3, 9 (March 8, 1994). A single incident or group of isolated incidents will not be regarded as discriminatory harassment unless the conduct is severe. Walker v. Ford Motor Co., 684 F.2d 1355, 1358 (llth Cir. 1982). Whether the harassment is sufficiently severe to trigger a violation of Title VII must be determined by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, 510 U.S. 17 (1993).

To establish a claim of hostile environment harassment, Complainant must show that: (1) she is a member of 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 the 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); see also Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001); Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998).

After a review of the entire record, we find that Complainant failed to establish a prima facie case of a hostile work environment. Specifically, Complainant failed to establish that any of the alleged harassment was based on her race, sex, or in reprisal for her prior protected EEO activity. For example, with regard to Complainant's allegation that her supervisor assaulted her, Complainant failed to provide detailed information regarding this incident and refused to provide more information about this incident to the investigator. The record reflects that Complainant was issued a 3 day suspension because after numerous formal

and informal counselings, Complainant's supervisor continued to receive complaints that Complainant's military orders were not timely, she continued to be excessively tardy, she was discourteous, and she was frequently away from her work station. While Complainant asserted that she was denied training, the record reflects that Complainant put in her individual development plan that she did not want to take any training. While Complainant asserted that she was harassed when she was the only employee required to complete military orders and to submit a transmittal sheet to the Finance Office that had to be dated and timed, the record reflects that these assignments were within Complainant's job description. Additionally, while Complainant's supervisor may have requested leave slips after Complainant was away for the office for long periods of time or when she was excessively tardy, the record reflects that Complainant was never required to submit a leave slip after going to the ladies room. Complainant did not establish that her supervisor yelling at her affected a term or condition of her employment. See Neeley v. Dep't of Justice, EEOC Appeal No. 0120110318 (March 20, 2012); Coward v. National Gallery of Art, EEOC Appeal No. 0120091662 (Aug. 18, 2009) (Complainant did not suffer a harm that affected a term or condition of her employment when her supervisor yelled at her and spoke to her in a hateful manner). The record reflects that the alleged incidents of discrimination were more likely the result of personality conflicts and general workplace disputes and tribulations. Finally, many of these allegations are nothing more than trivial slights and petty annoyances that do not rise to the level of severe or pervasive conduct. As a result, Complainant's has failed to establish that she was subjected to a hostile work environment on the bases of her race, sex, or in reprisal for her prior protected EEO activity.

CONCLUSION

***5** Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision because a preponderance of the evidence of the record does not establish that discrimination existed as alleged.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0610)

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 or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. 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 request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do

so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0610)

***6** If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Carlton M. Hadden
Director
Office of Federal Operations

Footnotes

1 Complainant's formal complaint was amended on May 25, 2010, August 19, 2010, and August 20, 2010.

EEOC DOC 0120122332 (E.E.O.C.), 2012 WL 5178399

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