



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Jeri M. Sotomayor,
Complainant,

v.

Dr. Francis J. Harvey,
Secretary,
Department of the Army,
Agency.

Appeal No. 01A43440
Agency No. ACAAF00203C0190
Hearing No. 360-2003-08328X

DECISION

Complainant timely initiated an appeal from the agency's final order concerning her equal employment opportunity (EEO) complaint of unlawful 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 appeal is accepted pursuant to 29 C.F.R. § 1614.405. For the following reasons, the Commission AFFIRMS the agency's final order.

BACKGROUND

The record reveals that complainant, a former Aircraft Mechanic Parts Repairer, WG-8840-7, at the agency's Corpus Christi Army Depot, timely filed, through counsel, a formal EEO complaint alleging that the agency had discriminated against her: (1) on the basis of sex (female) when she experienced harassment and stalking during the period February 8, 2002 through March 1, 2003; and (2) on the basis of reprisal (prior EEO activity under Title VII) when she was removed from employment during her probationary period, effective March 10, 2002.

At the conclusion of the investigation, complainant was provided a copy of the investigative report and requested a hearing before an EEOC Administrative Judge (AJ). A hearing was held telephonically, with 12 witnesses testifying. Neither party objected to the conduct of the hearing by telephone. The AJ thereafter issued a decision finding no discrimination, which the agency fully implemented.

Complainant was employed by the agency on a career-conditional appointment effective March 12, 2001, subject to satisfactory completion of a one-year probationary period. On February 27, 2002, complainant contacted the EEO Office alleging that she had been subjected to a hostile work environment based on her sex. On March 10, 2002, complainant's

employment was terminated prior to the expiration of her probationary period based on unsatisfactory conduct (causing a disturbance and leaving the workplace without permission on February 26, 2002).

The events leading up to complainant's termination began in late November/early December 2001, with an incident where complainant experienced a drug-interaction and was taken to the hospital by a Work Leader (Work Leader 1). Complainant's husband, who arrived later, implied that the incident had been her fault for taking medication improperly. Work Leader 1 commented to complainant that he would treat her better than her husband was treating her. Complainant felt that the comment was inappropriate, but did not act on it.

Subsequently, complainant began receiving anonymous gifts and notes at work, including flowers left on the hood of her truck. No one in the workplace claimed responsibility. Complainant stated that at first she thought the gestures were sweet, but became more concerned that they continued to occur. When flowers were left for her at her home on January 2, 2002, she became concerned, and stated to her coworkers that whoever was sending the gifts and notes should stop.

The next incident occurred on February 8, 2002. Both complainant's husband and the wife of complainant's coworker (Coworker A) received typewritten notes alleging that complainant and Coworker A were having an affair, and that complainant was pregnant with Coworker A's child. Complainant reported this event to her supervisors, who advised both her and Coworker A to take the matter to base security or the police. Both supervisors stated that they did not have any indication that this was a work-related matter, and that investigation into the origins of the letter revealed that it had been mailed from outside the agency base.

The next incident occurred on February 13, 2002, when some money was stolen from complainant's toolbox. One of the supervisors called a shop meeting and advised everyone of the theft, and that there would be an investigation and consequences for whoever had stolen the money. Later that evening, complainant realized that her keys were also missing. The supervisor did not call security because it was late in the evening and very few people were on duty then. Arrangements were made for security to be called in the morning, and for complainant to be driven home. The next morning, security was notified regarding the keys, and a security officer spoke at a shop meeting regarding possible consequences for misbehavior and theft.

On February 14, 2002, Work Leader 2, with whom complainant had a friendly relationship, informed complainant's supervisor about the incidents preceding the theft of the money and keys. Also on that date, complainant met with her second-level supervisor to discuss being moved to another work location, while Work Leader 2 contacted the agency's Criminal Investigator. On February 15, 2002, both Work Leader 2 and complainant gave statements indicating that they believed complainant was being stalked.

Complainant's second-level supervisor declined to move her, but her third-level supervisor offered to move her to a different building on a different (day) shift. Complainant declined because of child-care issues. In any event, the Criminal Investigator had begun to take statements from persons involved in these events.

On February 22, 2002, complainant received two anonymous telephone calls regarding her keys, directing her to look in her truck. She later found her keys in the glove box. Following this event, Work Leader 2 spoke with the security officer regarding whether complainant could park in an area closer to the building she worked in, which was under video surveillance, rather than in the more remote location where other employees parked. This request apparently was granted.¹

On February 25, 2002, complainant was assigned to work in the "bonding room," an enclosed facility that complainant's supervisor believed would provide her some measure of security. On this date, a coworker alerted complainant that there was a letter taped to her truck. Complainant and Coworker A retrieved the letter, which complainant stated was "scary," because whoever had written it knew her schedule, knew that she had not kept a doctor's appointment, and asked her whom she preferred, her husband, Coworker A, or her secret admirer. Complainant stated that she took the letter to a supervisor, who told her to call security, but the supervisor denied seeing the letter. Complainant left work with the letter. Work Leader 2 advised the Criminal Investigator about the letter, and he called complainant at home to arrange to meet with her the next day.

Complainant subsequently testified that on the night of February 25, 2002, someone broke into her house while she was sleeping, took the letter from where she had left it on top of the television, and left another note that said something like, "Hello sweetheart, I'll see you at work." Complainant stated that she discovered the break-in when she woke up the morning of February 26, 2002 and that she called the police and filed a police report. She also met with the Criminal Investigator that day to discuss what had happened.

In the afternoon of February 26, 2002, complainant reported to work. There was not enough work for her to do in the bonding room, and so she went to assist Coworker A in another location. The supervisor instructed Work Leader 1 to tell complainant to move back to the bonding room. Complainant was unhappy at being asked to move. She stated that the Work Leader was short with her, while he indicated that complainant was dawdling. In any event, they were upset with each other, and took the discussion to the Supervisor's office. The Work Leader was upset that complainant was not following his instructions, and complainant was upset about being moved around. They argued in front of the supervisor, and complainant used swear words. The supervisor told complainant that she needed to calm down and go back to work. Complainant stated that she could not do that, and left work without obtaining leave.

¹ On February 26, 2002, complainant discovered that although she had been parked in an area covered by surveillance cameras, the cameras did not videotape her vehicle. Complainant was then granted permission to park in a space where her vehicle could better be observed.

Supervisor H put her on leave without pay. He later stated that under the circumstances (including that complainant's regular supervisor was out sick), he was satisfied for her to just leave.

Complainant subsequently stated that it was during the discussion/argument in Supervisor H's office that she first began to suspect that Work Leader 1 was the person who was stalking her because of the way he was treating her. She did not elaborate on what caused her to have this sudden suspicion. Complainant testified, however, that Work Leader 1 had occasionally touched her on the back of her shoulder near her bra strap a couple of times, and a couple of times greeted her with a hug rather than the handshake he offered to men. Complainant stated, however, that she remedied that situation by offering Work Leader 1 her hand before he could hug her.

The next day, however, when Supervisor L learned of what had happened, he believed complainant's actions constituted absence without leave (AWOL). After consulting with Human Resources, he placed complainant on AWOL. It is not readily apparent when complainant first became aware of the AWOL charge. Work Leader 2 had previously contacted Supervisor H at complainant's behest, and was advised that complainant had been placed on leave without pay.

The record reflects that on March 1, 2002, complainant was run off the road, and filed a police report in that matter. This was also the date on which complainant first contacted an EEO Counselor, pursuant to arrangements made for her by Supervisor L. The EEO Counselor spoke with a number of persons between March 1 and March 8, 2002, including both Work Leaders and both Supervisors. On March 8, 2002, however, complainant received a notice of termination during her probationary period for causing a disturbance and leaving the workplace without permission (AWOL), effective March 10, 2002.

Complainant's second-line supervisor, Supervisor M, stated that he removed complainant because of her unsatisfactory conduct on February 26, 2002; to wit, using offensive language, creating a disturbance, and leaving the work site without permission. The record reveals that six male employees were also terminated during their probationary periods for various charges which included AWOL, discourtesy to a supervisor and a coworker, failure to cooperate, and failure to carry out a work assignment.

In her decision, the AJ found that complainant had not established that she was harassed based on her sex generally, nor sexually harassed by Work Leader 1, noting that whatever actions he had taken toward complainant did not amount to harassment. The AJ noted that the agency had been very responsive to a difficult situation, where it appeared that complainant was being harassed or stalked by an unknown person, with several incidents occurring outside of the workplace and little or no evidence to go on. The AJ further noted that the agency had taken prompt, reasonable measures to address the situation. The AJ also found that the agency had not retaliated against complainant by removing her during her probationary period, noting that several male probationary employees had been removed for similar offenses.

On appeal, complainant argues, *inter alia*, that the AJ “misconstrued the significance” of facts surrounding the incident which precipitated her removal. Complainant further notes that the agency’s decision to remove her followed very closely upon her initiation of EEO activity with regard to her harassment claim. The agency did not reply to the appeal.

ANALYSIS and FINDINGS

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. Factual findings issued without a hearing also are subject to *de novo* review, but will be upheld if supported by the preponderant evidence of record.

In the instant case, the AJ’s findings of fact are supported by substantial evidence of record. With regard to complainant’s allegation of harassment, and sexual harassment, the evidence is insufficient to establish that the agency should be held liable. First, with regard to sexual harassment, Work Leader 1’s actions (the comment at the hospital, touching complainant’s shoulder, greeting her with a hug) simply do not rise to the level of harassment, *i.e.*, did not affect a term or condition of complainant’s employment, and/or have the purpose or effect of unreasonably interfering with her work environment and/or create an intimidating, hostile, or offensive work environment. *See, e.g., Peppard v. Federal Deposit Insurance Corporation*, EEOC Appeal No. 01950588 (May 15, 1997).

Regarding the harassment/stalking, the Commission is not unmindful of the severe nature of the reported incidents. It is very unfortunate that despite the intercession of the agency and of local law enforcement, the person responsible was not identified. Neither could complainant provide the agency with evidence to connect the harassment to anyone within the agency. Nonetheless, while these incidents may have risen to the level of harassment, the agency, with little or no evidence to go on, took prompt remedial action to end the incidents in the workplace and to shield complainant from further incidents. *See, e.g., Pokladowski v. United States Postal Service*, EEOC Appeal No. 01995446 (July 27, 2000), *request to recon. den.*, EEOC Request No. 05A01245 (January 9, 2001). It is noted that despite the agency’s efforts, there were incidents which occurred outside of the workplace. However, without knowing the identity of the person responsible, the agency had no control over what happened outside of the workplace.

With regard to complainant’s claim of reprisal, complainant established a *prima facie* case of reprisal discrimination by showing that she engaged in protected activity under Title VII, that agency officials were aware of her protected activity, and that she was removed from

employment shortly after engaging in protected activity. See *Whitmire v. Department of the Air Force*, EEOC Appeal No. 01A00340 (September 25, 2000). The burden then shifted to the agency to proffer a legitimate, non-discriminatory explanation for its actions. *Texas Department of Community Affairs v. Burdine*, 45 U.S. 248, 253-54 (1981). The agency met this light burden by explaining that it terminated complainant's employment during the probationary period because of complainant's conduct on February 26, 2002 (arguing with her supervisor, using profanity, and departing the workplace without leave). The burden of proof then shifted back to complainant to show that the agency's proffered explanation was a pretext for discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). Complainant, however, failed to produce any such evidence. Rather, complainant acknowledged that she behaved inappropriately and departed the workplace without requesting leave. The agency proffered evidence of the termination of male employees for similar offenses. Complainant was unable as a matter of law to establish a *prima facie* case with regard to the harassment claim. Further, she did not proffer evidence to establish pretext in connection with the termination claim. In the absence of any evidence of pretext, complainant cannot meet her burden of persuading the finder of fact that the agency more likely than not was motivated by retaliatory animus when it terminated her employment. See *Burdine*, 509 U.S. 253.

The Commission acknowledges, as did the AJ, the suspect timing of complainant's termination. However, an agency is not required to refrain from non-discriminatory personnel actions it would otherwise take simply because the employee has engaged in EEO activity. See *Carter v. Department of Education*, EEOC Appeal No. 01842314 (August 25, 1986). Given that complainant's probationary period was almost up, the agency had little choice but to proceed despite the awkward appearance of its actions.

Finally, the Commission notes that the hearing in this case was held by telephone at the AJ's behest, without the objection of the parties.² The Commission has held today that testimony may not be taken by telephone in the absence of exigent circumstances, unless at the joint request of the parties and provided specified conditions have been met. *Louthen v. United States Postal Service*, EEOC Appeal No. 01A44521.³ However, since the facts of this case pre-date *Louthen* we will assess the propriety of conducting the hearing telephonically by considering the totality of the circumstances. Here, it is unclear whether exigent circumstances

² The mere lack of objection is not dispositive, however. See *Louthen v. United States Postal Service*, EEOC Appeal No. 01A44521.

³ In *Louthen*, the Commission has promulgated its policy regarding the taking of telephonic testimony in the future by setting forth explicit standards and obligations on its Administrative Judges and the parties. *Louthen* requires either a finding of exigent circumstances or a joint and voluntary request by the parties with their informed consent. When assessing prior instances of telephonic testimony, the Commission will determine whether an abuse of discretion has occurred by considering the totality of the circumstances. In particular, the Commission will consider factors such as whether there were exigent circumstances, whether a party objected to the taking of telephonic testimony, whether the credibility of any witnesses testifying telephonically is at issue, and the importance of the testimony given telephonically. Further, where telephonic testimony was improperly taken, the Commission will scrutinize the evidence of record to determine whether the error was harmless, as is found in this case.

existed. On the other hand, it is clear that there were no issues of witness credibility that might have been impacted by the taking of testimony telephonically. Under these circumstances, even if it is assumed that the AJ abused his discretion in this case by taking testimony telephonically, the Commission finds that his action constituted harmless error.

CONCLUSION

Based upon a careful review of the record, and for the foregoing reasons, it is the decision of the Equal Employment Opportunity Commission to AFFIRM the final agency action.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0701)

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), 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 19848, Washington, D.C. 20036. 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).

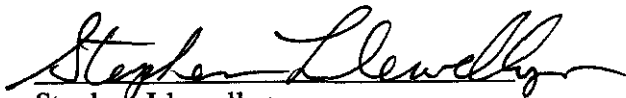
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0900)

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 (Z1199)

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 that the Court appoint an attorney to represent you and that the Court 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 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:



Stephen Llewellyn
Acting Executive Officer
Executive Secretariat

5/17/06
Date