



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P. O. Box 19848

Washington, D.C. 20036

George DeLos Santos,
Complainant,

v.

Stephen L. Johnson,
Administrator,
Environmental Protection Agency,
Agency.

Appeal No. 0120061139¹

Agency No. 20040065R6

DECISION

Pursuant to 29 C.F.R. § 1614.405, the Commission accepts complainant's appeal from the agency's August 6, 2004 final decision concerning his 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.* Complainant alleged that the agency discriminated against him on the basis of national origin (Hispanic) when:

1. Between December 2001 and August 2004, he was subjected to ongoing harassment and discrimination resulting in a hostile work environment ;
2. On April 21, 2004, he was discriminated against when he was issued a Memorandum of Warning.

At all relevant times, complainant worked as a Criminal Investigator for the Environmental Protection Agency and was assigned to the Office in El Paso, Texas. He frequently was given assignments that would require him to work out of the Office in Dallas, Texas. Complainant sought EEO Counseling on May 31, 2004. On August 6, 2004, complainant filed a formal complaint. In the complaint, complainant alleged that numerous incidents contributed to a hostile work environment, including negative comments about Hispanics, females, Native Americans, and African Americans; being assigned administrative and custodial tasks; and ultimately the issuance of a Memorandum of Warning. After conducting an investigation and

¹ Due to a new data system, this case has been redesignated with the above-referenced appeal number.

informing complainant of his right to request a hearing, the agency issued a finding of no discrimination on August 6, 2004. The agency found complainant was not subjected to a hostile work environment because the conduct alleged did not meet the severe or pervasiveness standard necessary to prove harassment, and there were legitimate, nondiscriminatory reasons for the issuance of the Memorandum of Warning. Complainant now appeals to the Commission.

ANALYSIS & FINDINGS

Hostile Work Environment

A hostile work environment claim is comprised of a series of separate acts that collectively constitute one unlawful employment practice. *National Railroad Passenger Corporation v. Morgan, Jr.*, 536 U.S. 101, 117 (2002). Unlike a claim which is based on discrete acts of discrimination, a hostile work environment claim is based upon the cumulative effect of individual acts that may not themselves be actionable. *Id.* at 115.

Complainant may assert a Title VII cause of action if the discriminatory conduct was so severe or pervasive that it created a hostile work environment on the basis of race, color, religion, sex, national origin, or retaliation. *See McCleod v. Social Security Administration*, EEOC Appeal No. 01963810 (August 5, 1999). To demonstrate a *prima facie* case of a hostile working environment complainant must show: (1) that he belongs to a protected group; (2) that he was subjected to unwelcome harassment; (3) that the harassment complained of was based on his protected status; (4) that the harassment affected a term, condition or privilege of employment; and, (5) that the agency knew or should have known of the harassment. *McCleod*, EEOC Appeal No. 01963810, citing *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986), finding harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of the complainant's employment. The Court explained that an "objectively hostile or abusive work environment [is created when] a reasonable person would find [it] hostile or abusive" and the complainant subjectively perceives it as such. *See Harris*, 510 U.S. at 21-22. Thus, not all claims of harassment are actionable. Where a complaint challenges an agency action or inaction regarding a specific term, condition or privilege of employment, a claim of harassment is actionable only if, allegedly, the harassment to which the complainant has been subjected was sufficiently severe or pervasive to alter the conditions of the complainant's employment.

In the case-at-hand, the agency found that the alleged harassment was not sufficiently severe. However, a thorough and objective reading of the record reveals the complainant and his coworkers have described a racially discriminatory workplace. The discriminatory workplace consisted of discriminatory comments by coworkers that were made against his national origin (Hispanic), for example: "It is Hispanic heritage month; when is it going to be white persons' heritage month?"; complainant's supervisor (S1), the Special Agent in Charge (SAC) of the Dallas and El Paso Offices, allegedly accused complainant of stealing license plates and selling

them for a large amount of money in Mexico; S1 purportedly inferred that complainant was only hired because the person who hired him was Hispanic; coworkers referred to women coworkers as "pussies"; coworkers referred to Native American coworkers as "Jumping Eagle," "Squatting Eagle," and "Two Dogs F__king"; coworkers made stereotyped comments about Native Americans and alcohol; and coworkers referred to a black coworker as mentally slow.² When this harassment was reported by the Resident Agent in Charge (RAC) of the El Paso Office to S1, S1 allegedly replied, "you need to act like a man because the unwelcome, racial, offensive statements were just Special Agent grab-assing." The harassment culminated with S1's issuance of a Memorandum of Warning to complainant.

Whether the harassment is sufficiently severe to trigger a violation of Title VII must be determined by looking at all of 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. *See Harris*, 510 U.S. 17. Here, we find that the harassment taken as a whole rises to the severe standard. We believe a reasonable person in complainant's shoes would consider the incidents as humiliating and creating an intimidating work environment for minorities, including complainant.

² The agency argues complainant may not use comments made to or about others based on their protected class as part of complainant's hostile work environment claim. The Commission and numerous federal circuits have considered racially discriminatory comments towards other protected classes as part of a complainant's overall hostile work environment claim. *See Barber, Eley, Powell & Johnson v. Dep't. of the Navy*, EEOC Appeal No. 05A50657 (March 16, 2006) (finding a complainant who alleged a hostile work environment based on comments against his race (black) and comments against other classes (Jewish and Hispanic) stated a claim); *see also, McAllister v. Department of Defense*, EEOC Request No. 05960416 (May 22, 1997) (a supervisor's disparaging and racist comments to complainant, in conjunction with prior comments by the supervisor demeaning to other protected classes, was sufficient to justify an AJ's finding of discrimination); *EEOC v. T.I.M.E.-D.C. Freight, Inc.*, 659 F.2d 690, 692 n.2 (5th Cir. 1981) (whites "may be 'persons aggrieved' by discrimination against blacks, provided that they can establish a personal injury"); *EEOC v. Mississippi College*, 626 F.2d 477, 483 (5th Cir. 1980) (white plaintiff "may charge a violation of her own personal right to work in an environment unaffected by racial discrimination.") When considering the overall hostility in the workplace, other comments not made directly to complainant may also be considered. *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, (4th Cir. 2001) (conduct of immediate supervisor that was targeted at individuals other than the black employee was relevant in determining whether conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere actionable under § 1981 or Title VII); *see also Shwapp v. Town of Avon*, 118 F.3d 106 (2nd Cir. 1997) (fact that employee was not present when racially derogatory comments were made did not render comments irrelevant to his Title VII hostile work environment claim.)

The record reveals that discrimination towards minorities permeated the workforce in the form of discriminatory and demeaning comments and adverse treatment. Complainant provided evidence to suggest that the harassment altered the conditions of complainant's employment. Specifically, complainant and his coworkers allege that only complainant and other minorities have failed on the shotgun exercises and have had their weapons confiscated; a white Special Agent has never been given a failure rating or had his gun confiscated. Additionally, there has been a pattern of assigning minority employees to the undesirable assignments. On three separate occasions S1 sent complainant, who is a Criminal Investigator, to the Dallas Office specifically to perform custodial tasks such as cleaning a conference room, cleaning an equipment room, and cleaning a file room, even though there were seven white agents at the Dallas Office that could have performed the tasks. S1 also assigned complainant remedial administrative tasks, such as acting as a chauffeur and photocopying. S1 followed this by writing a letter commending complainant on his chauffeur and photocopying abilities. Complainant was yelled at, put down, bad mouthed to other EPA Offices, denied relocation, and denied work related travel.

Ultimately, complainant submitted a written request to transfer to the Houston Office in order to be closer to family and get away from S1 and the hostile work environment. Within three days of complainant's request to transfer, S1 began issuing complainant memorandums that criticized his work, culminating in a written Memorandum of Warning. The record indicates the Memorandum of Warning was another act of harassment. While the agency articulated legitimate, nondiscriminatory reasons for the Memorandum of Warning (complainant's work documents lacked detail and he failed to recognize his poor performance), complainant proved this was more likely than not pretext for discrimination by demonstrating his work style was the same as it was before he requested the transfer, his work prior to the transfer request was always approved by S1, the documents in question were pre-approved by the RAC in El Paso, and S1's critique of complainant's work began three days after complainant requested the transfer. Additionally, S1 had never issued anyone else a Memorandum of Warning for similar problems.

Vicarious Liability

Once a hostile work environment is found, the fifth element of the *prima facie* case, showing that the agency knew or should have known of the harassment, addresses the issue of whether the agency should be held liable for the existence of a hostile working environment. An employer is subject to vicarious liability for harassment when, as here, it is "created by a supervisor with immediate (or successively higher) authority over the employee." See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); see also *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, No. 915.002 (June 18, 1999) ("Vicarious Liability Guidance"). The agency can raise an affirmative defense when complainant establishes a *prima facie* case, which is subject to proof by a preponderance of the evidence, by demonstrating: (a) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and, (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.*, at Section V.

Here, many of the offensive comments by coworkers occurred in front of supervisors immediately after a meeting about EEO issues, demonstrating that agency officials did not take EEO issues seriously. Complainant reported the conduct to S1, the RAC of the El Paso Office, and the SAC of the LA Office. We find thē agency failed to exercise reasonable care to prevent and correct promptly any harassing behavior, and complainant reasonably attempted to take advantage of any preventive or corrective opportunities provided by the employer.

CONCLUSION

Therefore, the agency's finding of no discrimination is REVERSED. The agency must comply with the order outlined below.

ORDER

1. The agency shall immediately cease and desist from all conduct directed at complainant and other members of his protected class, and ensure that complainant is no longer subjected to a hostile work environment because of his national origin and/or protected activity. Such action shall include assuring that S1 is not placed in a supervisory role over complainant. Further, the agency shall ensure that others at the facility are protected from a hostile work environment.
2. Within sixty (60) calendar days of the date that this decision becomes final, the agency shall provide management officials at its El Paso and Dallas District Offices, Texas, with at least forty (40) hours of EEO training regarding their obligations and responsibilities under the federal employment anti-discrimination laws, paying particular attention to harassment.
3. Within sixty (60) calendar days of the date that this decision becomes final, the agency shall provide all employees at its El Paso and Dallas District Offices, Texas, with at least forty (40) hours of EEO sensitivity training, designed to eliminate acts of harassment in the workplace.
4. The agency shall consider taking appropriate disciplinary action against the responsible management officials. The Commission does not consider training to be disciplinary action. The agency shall report its decision to the compliance officer. 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 any of the responsible management officials have left the agency's employ, the agency shall furnish documentation of their departure date(s).

5. The agency will conduct a supplemental investigation on the issue of complainant's entitlement to compensatory damages and will afford him an opportunity to establish a causal relationship between the violations found in this case with his pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the agency's efforts to compute the amount of compensatory damages, and will provide all relevant information requested by the agency. The agency will issue a final decision on the issue of compensatory damages. 29 C.F.R. § 1614.110. The supplemental investigation and issuance of the final decision will be completed with sixty (60) calendar days of the date of this decision. A copy of the final decision must be submitted to the Compliance Officer, as referenced below.
6. The agency shall post the attached notice, as more fully set forth in the "Posting Order" below.
7. The agency shall pay complainant's reasonable attorney's fees and costs in accordance with the Attorney's Fees order herein.
8. 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 (G0900)

The agency is ordered to post at its El Paso and Dallas District Offices, Texas, facility copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (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 at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

ATTORNEY'S FEES (H0900)

If complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the agency. The attorney shall submit a verified statement of fees to the agency -- not

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 (R0900)

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 (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:



Carlton M. Hadden, Director
Office of Federal Operations

JAN 1 1 2008

Date



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

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
An Agency of the United States Government**

This Notice is posted pursuant to an order by the United States Equal Employment Opportunity Commission dated _____ which found that a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. has occurred at the Environmental Protection Agency's El Paso and Dallas, Texas facilities (hereinafter these facilities).

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, or DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

These facilities were found to have discriminated against an employee because of his national origin. These facilities were ordered to pay reasonable attorney's fees and compensatory damages, if applicable. The agency was ordered to provide training, consider taking disciplinary action against the responsible official and post this notice. These facilities will ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the requirements of all federal equal employment opportunity laws and will not retaliate against employees who file EEO complaints.

These facilities will comply with federal law and will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, federal equal employment opportunity law.

Date Posted: _____

Posting Expires: _____

29 C.F.R. Part 1614

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:


George DeLos Santos
2690 Nelson Wyatt Rd
Mansfield, TX 76063

Alice Rodriguez
P.O.B.300517
Arlington, TX 76007

Karen Higginbotham, Associate Director
Office of Civil Rights
Environmental Protection Agency
1200 Pennsylvania Ave., NW MC: 1201A
Washington, DC 20460

JAN. 11 2008

Date



Equal Opportunity Assistant