

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Federal Operations**  
**Washington, DC 20013**

**Kenneth R. Barr, Complainant,**  
**v.**  
**United States Postal Service, (Southeast Area), Agency.**

Appeal No. 0120093735  
Agency No. 1H337001809

**DECISION**

Complainant filed a timely appeal with this Commission from the agency's decision dated July 28, 2009, dismissing his 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. Upon review, the Commission finds that complainant's complaint was properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

In a complaint dated July 17, 2009, complainant alleged that he was subjected to discrimination on the bases of sex (sexual preference) and reprisal for prior protected EEO activity when, on June 3, 2009, complainant was subjected to harassment which the agency did not handle properly.

The record indicates that when complainant arrived to work on June 3, 2009, a coworker (CW1) handed him a postcard with a picture of two men holding each other. The record indicates further that complainant and another co-worker (CW2) laughed at the postcard but reported the incident to complainant's supervisor. Complainant alleges that his supervisor addressed the issue of the postcard and indicated that such behavior was unacceptable, in front of the entire group of employees on complainant's workroom floor rather than just with complainant and CW1 and CW2. Complainant alleges that the supervisor's conduct in addressing the postcard was for the purpose of harassing complainant because of his sexual orientation and in reprisal for engaging in prior protected EEO activity.

In determining whether a harassment complaint states a claim in cases where a complainant had not alleged disparate treatment regarding a specific term, condition, or privilege of employment, the Commission has repeatedly examined whether a complainant's harassment claims, when considered together and assumed to be true, were sufficient to state a hostile or abusive work environment claim. See *Estate of Routson v. National Aeronautics and Space Administration*, EEOC Request No. 05970388 (February 26, 1999).

Consistent with the Commission's policy and practice of determining whether a complainant's harassment claims are sufficient to state a

hostile or abusive work environment claim, the Commission has repeatedly found that claims of a few isolated incidents of alleged harassment usually are not sufficient to state a harassment claim. See *Phillips v. Department of Veterans Affairs*, EEOC Request No. 05960030 (July 12, 1996); *Banks v. Health and Human Services*, EEOC Request No. 05940481 (February 16, 1995). Moreover, the Commission has repeatedly found that remarks or comments unaccompanied by a concrete agency action usually are not a direct and personal deprivation sufficient to render an individual aggrieved for the purposes of Title VII. See *Backo v. United States Postal Service*, EEOC Request No. 05960227 (June 10, 1996); *Henry v. United States Postal Service*, EEOC Request No. 05940695 (February 9, 1995).

In determining whether an objectively hostile or abusive work environment existed, the trier of fact should consider whether a reasonable person in the complainant's circumstances would have found the alleged behavior to be hostile or abusive. Even if harassing conduct produces no tangible effects, such as psychological injury, a complainant may assert a Title VII cause of action if the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin. *Rideout v. Department of the Army*, EEOC Appeal No. 01933866 (November 22, 1995) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993)) request for reconsideration denied EEOC Request No. 05970995 (May 20, 1999). Also, the trier of fact must consider all of the circumstances, including the following: 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*, 510 U.S. at 23.

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. *Diaz v. Department of the Air Force*, EEOC Request No. 05931049 (April 21, 1994).

Upon review, the Commission finds that the complaint fails to state a claim under EEOC regulations because complainant failed to show that he suffered harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. See *Diaz v. Department of the Air Force*, EEOC Request No. 05931049 (April 21, 1994). The record does not indicate that complainant lost pay, received discipline or was subjected to any adverse action as a result of the agency's alleged conduct. Moreover, the Commission finds that complainant has failed to demonstrate that the conduct of the agency was so severe and pervasive that it altered the conditions of complainant's employment.

The Commission notes further that with regard to complainant's claim of discrimination based on sexual orientation, we find that the agency properly dismissed this basis of complainant's complaint. We note that Title VII's prohibition of discrimination based on sex does not

include sexual preference or orientation. See Johnson v. United States Postal Service, EEOC Request No. 05910858 (December 19, 1991); Morrison v. Department of the Navy, EEOC Request No. 05930964 (June 16, 1994). Thus, complainant's claim of discrimination based on sexual orientation is not covered by EEOC regulations.

Accordingly, the agency's final decision dismissing complainant's complaint is affirmed for the reasons set forth herein.

FOR THE COMMISSION:

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Carlton M. Hadden, Director

Office of Federal Operations

March 4, 2010

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Date

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M1208)

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 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 (S0408)

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 (Z1008)

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").