

EEOC DOC 0520140441 (E.E.O.C.), 2016 WL 3361228

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

Office of Federal Operations

\* \* \* SHELTON D., COMPLAINANT,

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE (WESTERN AREA),  
AGENCY.

Request No. 0520140441

Appeal No. 0120141334

Agency No. 1E-801-0049-13

June 3, 2016

DECISION ON REQUEST FOR RECONSIDERATION

\*1 The Agency timely requested reconsideration of the decision in [EEOC Appeal No. 0120141334 \(June 20, 2014\)](#). EEOC regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

On January 8, 2014, Complainant filed a formal complaint in which he alleged that the Agency subjected him to discrimination on the basis of race (African American) and in reprisal for prior EEO activity when, starting in the fall of 2013, a coworker (C1) repeatedly wore a cap to work with an insignia of the Gadsden Flag, which depicts a coiled rattlesnake and the phrase “Don’t Tread on Me.” Complainant stated that he found the cap to be racially offensive to African Americans because the flag was designed by Christopher Gadsden, a “slave trader & owner of slaves.” Complainant also alleged that he complained about the cap to management; however, although management assured him C1 would be told not to wear the cap, C1 continued to come to work wearing the offensive cap. Additionally, Complainant alleged that on September 2, 2013, a coworker took a picture of him on the work room floor without his consent. In a decision dated January 29, 2014, the Agency dismissed Complainant’s complaint on the basis it failed to state a claim.

In our previous decision, the Commission found that the Agency improperly dismissed Complainant’s complaint because Complainant’s allegations constitute a cognizable claim of harassment under EEOC regulations. In so finding, the Commission cited our holding in [Complainant v. U.S. Postal Service, EEOC Appeal No. 0120132144 \(November 1, 2013\)](#), which held that management’s failure to stop employees from wearing t-shirts featuring the Confederate flag constituted a viable claim of racial and retaliatory harassment. Consequently, the Commission remanded the complaint to the Agency for further processing.

In its request for reconsideration, the Agency maintains that our previous decision was clearly erroneous and should be reversed. Specifically, the Agency argues that the Gadsden Flag and its “Don’t Tread on Me” slogan do not have any racial connotations. The Agency maintains that historians indicate that Benjamin Franklin made an early reference to rattlesnakes in 1751 when he stated that colonists should release rattlesnakes in various locations in London as a response to the Crown’s practice of shipping convicts to the colonies. The Agency further maintains that the yellow flag with the coiled rattlesnake and “Don’t Tread on Me” slogan was suggested by Colonel Christopher Gadsden of the American Revolutionary War’s Continental Army to Commodore Esek Hopkins, the commanding officer of the first warship of the Continental Navy, and that Hopkins flew the flag on his warship during naval actions against Britain. The Agency asserts that this naval ensign morphed into a striped flag with a rattlesnake and the “Don’t Tread on Me” slogan. The Agency contends that there is no evidence “whatsoever” that the Gadsden Flag historically was a symbol of racism, beyond Complainant’s bare assertions.

\*2 Additionally, the Agency maintains that Complainant’s claim that Christopher Gadsden traded and owned slaves does not

make the flag racist because Gadsden's "personal business" had nothing to do with the flag. The Agency also points out that there is scholarly work that indicates that Gadsden did not trade slaves, although there is evidence that he owned them. The Agency further contends that the Commission's comparison of the Gadsden flag to the Confederate Battle Flag is inapposite because the Confederate Battle Flag was "clearly a symbol of a political structure which supported and defended slavery," whereas the Gadsden Flag "had nothing whatsoever to do with slavery or racism." The Agency asserts that Complainant's perception that the Gadsden Flag is a symbol of racism is based on "ignorance of history."

In response, Complainant maintains that we should deny the Agency's request for reconsideration. Complainant maintains that the Gadsden Flag is a "historical indicator of white resentment against blacks stemming largely from the Tea Party." He notes that the Vice President of the International Association of Black Professional Firefighters cited the Gadsden Flag as the equivalent of the Confederate Battle Flag when he successfully had it removed from a New Haven, Connecticut fire department flagpole.

After a thorough review of the record, it is clear that the Gadsden Flag originated in the Revolutionary War in a non-racial context. Moreover, it is clear that the flag and its slogan have been used to express various non-racial sentiments, such as when it is used in the modern Tea Party political movement, guns rights activism, patriotic displays, and by the military. However, whatever the historic origins and meaning of the symbol, it also has since been sometimes interpreted to convey racially-tinged messages in some contexts. For example, in June 2014, assailants with connections to white supremacist groups draped the bodies of two murdered police officers with the Gadsden flag during their Las Vegas, Nevada shooting spree.<sup>2</sup> Additionally, in 2014, African-American New Haven firefighters complained about the presence of the Gadsden flag in the workplace on the basis that the symbol was racially insensitive.<sup>3</sup> Certainly, Complainant ascribes racial connotations to the symbol based on observations that it is sometimes displayed in racially-tinged situations.

In light of the ambiguity in the current meaning of this symbol, we find that Complainant's claim must be investigated to determine the specific context in which C1 displayed the symbol in the workplace. In so finding, we are not prejudging the merits of Complainant's complaint. Instead, we are precluding a procedural dismissal that would deprive us of evidence that would illuminate the meaning conveyed by C1's display of the symbol. Additionally, we note that in order to determine whether an actionable claim of harassment exists, the Agency must view the allegedly harassing incidents in the light most favorable to Complainant. See [Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 \(Mar. 13, 1997\)](#). Therefore, we find that our previous determination reversing the Agency's dismissal was not erroneous.

\*3 After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the request. The decision in [EEOC Appeal No. 0120141334](#) remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth below.

#### ORDER (E0610)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision becomes final. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision within sixty (60) days of receipt of Complainant's request.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to

the Complainant. 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.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)

\*4 This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. 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.

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

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.

Footnotes

- <sup>2</sup> [Shooters in Metro ambush that left five dead spoke of white supremacy and a desire to kill police](http://www.reviewjournal.com/news/las-vegas/shooters-metro-ambush-left-five-dead-spoke-white-supremacy-and-desire-kill-police), Las Vegas Review-Journal, June 8, 2014, available online at: <http://www.reviewjournal.com/news/las-vegas/shooters-metro-ambush-left-five-dead-spoke-white-supremacy-and-desire-kill-police>.
- <sup>3</sup> Paul Bass, [Flag Sparks Fire Department Complaint](http://www.newhavenindependent.org/index.php/archives/entry/tea_party_fire_department/), New Haven Independent, Feb. 25, 2014, available online at: [http://www.newhavenindependent.org/index.php/archives/entry/tea\\_party\\_fire\\_department/](http://www.newhavenindependent.org/index.php/archives/entry/tea_party_fire_department/).

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