



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Federal Operations**  
**P.O. Box 77960**  
**Washington, DC 20013**

████████████████████  
Denise Y.,<sup>1</sup>  
Complainant,

v.

Dr. David J. Shulkin,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 0120150665

Hearing No. 530-2013-00119X

Agency No. 2004-0512-2012102418

**DECISION**

On November 19, 2014, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's October 20, 2014, final decision 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. For the following reasons, the Commission REVERSES the Agency's final decision.

**BACKGROUND**

On May 21, 2012, Complainant filed an EEO complaint in which she alleged that the Director of Podiatric Medical Education (Director S1), her first-line supervisor, and the Chief of Podiatry, her second-line supervisor (S2), had retaliated against her for her prior EEO activity when: 1) she was terminated from the Podiatry Resident's Program, effective February 13, 2012; and 2) she was terminated from employment, effective March 30, 2012.

At the conclusion of the investigation into her complaint, the Agency notified Complainant of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing, but subsequently withdrew her request. Following the remand from the AJ

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<sup>1</sup> 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.

for a final decision on the record, the Agency conducted a supplemental investigation. The Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b) concluding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

In its final Agency decision (FAD), the Agency found the following facts. On June 21, 2009, the Agency hired Complainant for a three-year term as a Podiatry Resident at its Medical Center in Baltimore, Maryland. Investigative Report (IR) 203. On June 15, 2011, Director S1 sent an email to all residents that contained the work schedule for the 2011-2012 academic year. Complainant was included on this schedule. She was assigned a research project that was a requirement of the Residency Program. The research project concluded June 21, 2011. After its conclusion, management told her that she may have to take leave or go into a leave without pay status. Complainant made no application for leave and left the program on June 23, 2011. During this time, Complainant requested a waiver from the Council on Podiatric Medical Education (CPME), a separate entity from the Agency, to allow her to receive her certificate of completion in two years, rather than three. On July 12, 2011, the CPME denied the waiver of her training requirements.

After Complainant's waiver was denied, Director S1 called multiple hospitals to assist her in obtaining the requirements needed for her certification. Hospital A was the only one who agreed to take her. Due to a misunderstanding, Hospital A believed that Complainant had resigned, and deactivated her credentials. A doctor at Hospital A reinstated Complainant and arranged a six to eight-week rotation for Complainant where she could gain missing numbers needed for her certification. Complainant did not report for duty. On August 16, 2011, the Agency issued Complainant a letter requesting her to return to duty. The letter stated that since June 23, 2011, Complainant had been absent from duty, and did not make any appropriate leave requests. The letter notified her that she would be considered Absent Without Official Leave (AWOL) until she returned to duty. Complainant was charged with AWOL from June 23, 2011, to December 21, 2011.

On December 20, 2011, the Complainant was issued a proposed letter of termination from the Podiatry Resident's Program for unauthorized absences. According to the Agency, she was given an opportunity to provide a written response, but failed to do so.

The Agency assumed that Complainant had established a prima facie case of reprisal discrimination. The Agency concluded that it had articulated legitimate, nondiscriminatory reasons for Complainant's termination. S2 stated that Complainant was terminated from the podiatry program because of her continued unauthorized absences and unresponsiveness to management's efforts to reach her and get her to return to work. S2 asserted that management treated her fairly and impartially and supported her by applying for the waiver with CPME while revising her training schedule in an attempt to appeal the decision. Director S1 stated that he called multiple people at different hospitals to assist Complainant in obtaining her certification and that only Hospital A would take her.

The investigative record shows that S2 averred that by June 2011, during the rotation assignment that began April 1, 2011, interpersonal relations between Complainant and the Chief Resident had deteriorated to the point at which it began to affect patient care. To address the situation, S2 had met with Director S1 and the Chief of Academic Affairs (CAA) and determined that it would be best to separate the two residents. Because of the difficulties inherent in relocating the Chief Resident, and due to the need to find a residency program that would enable Complainant to complete her training requirements in Podiatry, the three of them decided that Complainant would be reassigned to the Agency's Medical Center in Washington, D.C. Complainant was reassigned to the D.C. Medical Center on June 1, 2011, but had returned to Baltimore on June 22, 2011. S2 further averred that the following day, June 23, 2011, Complainant left the residency program. According to Director S1 and S2, on July 19, 2011, Complainant returned for a mediation, in relation to a prior EEO complaint she had filed, but walked out after Director S1 informed her that they could not give her what she was asking for. Following the mediation, Complainant returned on July 27, 2011, to meet with the Business Manager, and again on August 3, 2011, to meet with S2 about when she could return to work. Director S1 averred that Complainant did not return after August 3, 2011. IR 127-33, 159, 170-71. The Agency submitted records and email exchanges documenting Complainant's absences from work. IR 156-57, 211-31.

In a letter addressed to Complainant dated August 16, 2011, S2 informed Complainant of the "seriousness" of her employment situation and ordered her to return to duty effective immediately. S2 also warned Complainant that she would continue to be charged with absence without leave until she either returned or provided appropriate leave requests. IR 204. On December 20, 2011, S2 issued Complainant a notice of proposed termination based on unauthorized absences. The notice provided for an opportunity to contest the proposal. IR 141-43, 207. On February 13, 2012, the Chief of Staff issued a notice informing Complainant that she would be terminated from the Podiatric Program based on unauthorized absences. IR 143, 208. On March 15, 2012, Complainant received a notice from the Director of the Medical Center informing her that her employment with the Agency would be terminated, effective March 30, 2012. The notice stated, "this termination is based on termination from the Podiatry Program as a result of unauthorized absences." IR 144-48, 209-10.

The Agency found that Complainant attempted to prove that its reasons for her termination were pretext for discrimination by arguing that she continued to go to work every day, although she was placed on leave without any authorization as she had not submitted any written request for annual leave and did not want leave. The Agency also found that Complainant argued that she did not receive a rotation schedule, and that S2 knew that she made attempts to come to work, but told her to leave because there was nothing for her to do. She asserted that Director S1 told another resident that if he supported Complainant in anyway, his job would be in jeopardy.

The Agency stated in response to Complainant's pretext arguments that even if management did not provide her with a schedule, Complainant had not offered any connection between that action and her EEO activity. It found that although she claimed that she continued to report to work, she offered no evidence to support this.

The Agency also found that the fact that Complainant did not offer a rebuttal for her absences when management issued her the two request to return to work letters weighed against her claim that she was reporting for duty, but being sent home. The Agency concluded that Complainant had not supported her argument of pretext with sufficient evidence to establish that she had been discriminated against on the basis of reprisal. Complainant filed the instant appeal.

#### CONTENTIONS ON APPEAL

In her brief in support of her appeal, Complainant argued that she was treated less favorably than the other podiatry residents, who had not participated in protected EEO activity, and that the less favorable treatment began almost immediately after her supervisors became aware of her EEO complaint. She further argued that through discussions with payroll personnel she understood herself to be in a Leave Without Pay (LWOP) status and not AWOL. Complainant specifically argued that, beginning on June 1, 2011, she was the only podiatry resident assigned to a third rotation at the Agency's D.C. Medical Center, which was considered an undesirable assignment because there were too many residents in the program, resulting in the residents not receiving as much hands-on experience as they would receive at other hospitals. The D.C. Medical Center Rotation Director sent her back to the Baltimore Medical Center in early June 2011.

As of June 15, 2011, Complainant claimed that she was the only podiatry resident who did not receive a schedule. Complainant emphasized that the Agency refused to produce a copy of the 2011-2012 academic year work/rotation schedule when requested by the EEO Investigator. She argued that her supervisory chain refused to assign her any clinical or surgical work, which she was required to complete for her certification, and she was instead assigned to do a library-based research project for the CAA, which she completed by June 21, 2011. Complainant claimed she had already completed a program-required research project prior to this assignment. Once she completed the second research assignment, the CAA told Complainant that there was no work for her and that she would have to take leave or go into LWOP status. Complainant claimed that she kept reporting to work and was repeatedly told to either report to the library or go home as there was no work for her to do.

Complainant also argued that she was the one, not Director S1, who arranged for an assignment with Hospital A, which agreed to permit Complainant to perform clinic and surgery requirements at its facility. On July 19, 2011, Hospital A notified Complainant that it had received her resignation, which she denied having submitted. Complainant claimed that Director S1 had informed Hospital A that Complainant resigned. Hospital A reinstated Complainant on July 28, 2011. Complainant claims she repeatedly asked Director S1 for her schedule, who ordered Complainant to report to the Baltimore Medical Center because she was "not cleared for any other location." She claims that on August 2, 2011, Director S1 prohibited her from reporting to Hospital A.

Complainant claims that she did send a response to the December 20, 2011 proposed letter of termination, but that the letter instructed her to send her reply to Director S1 and she was not

comfortable doing that as she felt he had been retaliating against her. She says she instead sent her response to two individuals in Human Resources.

The Agency submitted a statement in opposition to Complainant's appeal in which it argued that Complainant had not supported her arguments of reprisal with documentary evidence that linked the Agency's decision to remove her from the residency program and to terminate her employment with her prior EEO complaint. It urged the Commission to affirm its FAD.

#### STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (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").

#### ANALYSIS AND FINDINGS

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). She must generally establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

#### *Prima facie case of reprisal*

To establish a prima facie case of reprisal, Complainant must show that (1) she engaged in protected EEO activity; (2) the Agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the Agency; and (4) a nexus exists between her protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

Complainant previously contacted an EEO Counselor on May 31, 2011. Director S1 became aware of Complainant's initiation of the EEO process on June 6, 2011. On August 4, 2011,

Complainant filed an EEO complaint in which she alleged that the Agency had subjected her to a hostile work environment on the basis of reprisal, listing incidents dating from November 2009 through October 2011, and including claims that she had been placed in LWOP status on July 5, 2011 without her authorization, and that on October 7, 2011, Director S1 failed to provide Complainant with a Certification of Completion of Residency Podiatry Medicine and Surgery. Complainant's claimed initial protected EEO activity consisted of her earlier complaints to Director S1 concerning her claim of harassment by a co-worker and discrimination based on her national origin. She also claimed that Director S1 created a hostile work environment by encouraging such discrimination in the workplace. In *\*\*\* v. Department of Veterans Affairs*, EEOC Appeal No. 0120120703 (April 10, 2012), the Commission reversed the Agency's dismissal of the complaint for failure to state a claim, and remanded the matter for processing.

In this case, we find that Complainant engaged in protected EEO activity when she complained to Director S1 about harassment by a co-worker and discrimination based on national origin prior to May 31, 2011. At the very least her previous EEO activity occurred on May 31, 2011, when she initiated EEO counseling regarding the multiple incidents of an alleged hostile work environment, as enumerated in the complaint at issue in EEOC Appeal No. 0120120703. That complaint was being processed during the period at issue in the instant complaint, which concerns Complainant's termination from the Podiatry Program and from the Agency. We find that Director S1 and S2 were aware of Complainant's EEO activity. We find the necessary nexus between Complainant's prior EEO complaint and the two termination actions, in that the reason given for the terminations was Complainant's "unauthorized absences" from the workplace, which were due to her not being given assignments, and not being placed in the rotation schedule which was sent out on June 15, 2011, within 2 weeks of Director S1 becoming aware of her protected EEO activity.

*Agency's legitimate, nondiscriminatory reasons*

The burden now shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. In this case, the Agency's articulated reason for terminating Complainant from the Podiatry Program was her documented unauthorized absences from work since June 23, 2011. The reason for her termination from employment was her termination from the Podiatry Program. Accordingly, we find that the Agency has satisfied its burden of providing a legitimate nondiscriminatory reason for its decisions to terminate Complainant.

*Pretext*

To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Pretext can be demonstrated by showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. *Opore-Addo v. U.S. Postal Serv.*, EEOC Appeal No. 0120060802 (Nov. 20, 2007), request for reconsideration denied, EEOC Request No. 0520080211 (May 30, 2008).

Complainant argued that she was the only podiatry resident who did not receive a schedule and that her supervisory chain refused to assign her any clinical or surgical work. Complainant emphasized that the Agency refused to produce a copy of the 2011-2012 academic year work/rotation schedule when requested by the EEO Investigator. A review of the complaint file and report of investigation, including the supplemental report of investigation, shows that the Agency did not produce the rotation schedule for the 2011-2012 academic year, which began on July 1, 2011. Although the email from Director S1 is included in the report of investigation showing that Complainant was sent the schedule, the actual schedule was not provided. The Agency has therefore not shown that Complainant was assigned any work.

When asked by the investigator why she believed that Director S1 and S2 had retaliated against her when they terminated her, Complainant replied, "it was clearly evident that from May 31, 2011, when I filed my complaint (contacted an EEO counselor on the prior complaint), everything quickly went downhill." IR 104-06. Complainant also asserted that Director S1 told another resident that if he supported Complainant in anyway, his job would be in jeopardy. The EEO Investigator contacted this resident to obtain an affidavit regarding Complainant's claim, but he refused to testify.

Complainant claims that she reported to work several times after completing the research project she was assigned, namely after June 22, 2011. She was told there was no work for her. The Agency does not provide any convincing reason why Complainant was not simply informed of the rotation schedule at these times and sent to perform her duties. The Agency does not provide any convincing reason why Complainant's self-arranged assignment at Hospital A was not permitted and why she was told to report to the Baltimore Medical Center instead but then not given any assignments. Complainant was under the understanding that she was in a LWOP status, but the Agency had placed her in an AWOL status. Complainant's response to the Agency's proposed letter of termination is not included in the record.

We find that Complainant has shown that the Agency's reasons for her removal from the Podiatry residency program and from the Agency, that she had been in an unauthorized leave status and refused to report to work, were pretext for discrimination based on reprisal.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we REVERSE the Agency's final decision finding Complainant did not establish that she was discriminated against as alleged. The Commission REMANDS the matter for further processing in accordance with the Order below.

### ORDER

1. Within 60 calendar days of the date this decision is issued, the Agency shall determine the amount of back pay due Complainant from the date she was placed on AWOL, June 22, 2011, until the date Complainant's residency would have ended.

2. Within 60 calendar days from the date of the determination of the amount of back pay, the Agency pay the determined amount to Complainant.
3. Within 90 calendar days of the date this decision is issued, the Agency shall conduct a supplemental investigation into Complainant's entitlement to compensatory damages and determine the amount of compensatory damages to which Complainant is entitled. The Agency shall pay Complainant the determined amount of compensatory damages within 30 calendar days of the date of the determination.
4. Within 90 calendar days of the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive training to S1 and S2, with a particular emphasis on the Agency's obligations regarding Title VII and the obligation not to engage in retaliation for EEO activity.
5. Within 60 calendar days of the date this decision is issued, the Agency shall consider disciplining S1 and S2. 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).
6. Within 30 calendar days of the date this decision is issued, the Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include evidence that the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Baltimore Medical Center copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 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 as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).



ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he 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** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

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 in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0617)

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. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. 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 Agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 (R0610)

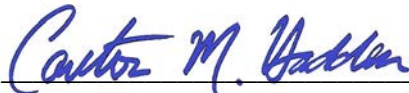
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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 (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:



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Carlton M. Hadden, Director  
Office of Federal Operations

February 28, 2018

Date