



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Ardelle P.,¹
Complainant,

v.

Janet Dhillon,
Chair,
Equal Employment Opportunity Commission,
Agency.

Appeal No. 0120161880

Agency No. 2015-0044

DECISION

Complainant timely 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 April 1, 2016, final decision (FAD) 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 AFFIRMS the Agency's FAD.²

ISSUES PRESENTED

Whether the Agency's final decision correctly determined that Complainant did not establish that she was subjected to unlawful discrimination and harassment based on her race (Black) and in reprisal for prior EEO activity when: (1) on April 5, 2015, she was not selected for the position of Investigator (GS-7) in the Raleigh Area Office (Vacancy Announcement No. M15-CHARA-13699019-017-JRG); (2) on May 12, 2015, she was issued a Letter of Warning for unprofessional conduct during an intake interview with a Charging Party; and (3) since 2008 and on a continuing

¹ 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.

² As a procedural matter, we note that the Equal Employment Opportunity Commission (EEOC) is both (1) the respondent Agency and (2) the adjudicatory authority issuing this decision. For the purposes of this decision, the term "Commission" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to EEOC in its role as the respondent party. In all cases, the Commission in its adjudicatory capacity operates independently from those offices charged with in-house processing and resolution of discrimination complaints.

basis to the present, she was required to work outside her Position Description (Investigative Support Assistant) and performed higher-level duties that supported a higher grade and pay.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Investigative Support Assistant (ISA) (GS-7) at the Agency's Raleigh Area Office in Raleigh, North Carolina. Complainant alleges that beginning around 2008, when her second-level supervisor (S2) became the Raleigh Area Office Director, she complained about a "sexually hostile environment." Complainant claimed that S2 consistently hired young White females and took them to lunch all the time. She contends that S2 would not assign these interns to work with Investigators – the typical practice. Alternatively, if the interns were "Black or ugly" they would be assigned to work with an Investigator. Between 2012-2013, Complainant alleges that she was subjected to racial discrimination, and that she complained about this as well. Complainant never filed an EEO complaint on either allegation.

Non-selection for the GS-7 Investigator Position

In March 2015, Complainant applied for the GS-7 Investigator position, and on May 5, 2015, she received an email from USA Staffing indicating that she was not referred for the position. Upon receipt of this email she contacted an OHR Specialist to inquire about why she did not make the certificate of eligibles (certificate). Complainant also asked who made the certificate. Complainant was advised that the OHR Specialist was unable to give her the requested information. The record reflects that the Agency received 193 applications for the position, and that 17 applicants were on the certificate which was forwarded to the selecting official. Complainant's name was not on the certificate because her score of 92 did not meet the 97-point cut off score for the position, and she also failed to submit her most recent performance appraisal. C1, the ultimate selectee, was appointed, on July 27, 2015, under a non-competitive appointment. No candidate from the certificate was selected or interviewed. C1 is a Black male.

Letter of Warning

On May 12, 2015, the Enforcement Supervisor issued Complainant a Letter of Warning (LOW) after investigating an incident that occurred between Complainant and a Charging Party in the office. On or around March 17, 2015, Complainant counseled a Charging Party that her sex discrimination claim was "not going to go far." The Charging Party became upset and requested to see a supervisor, and Complainant asked S2 to speak with her. When S2 arrived and asked Complainant to leave the room while he spoke with the Charging Party, Complainant became loud and upset. She did not leave the room immediately upon his request. The Agency maintained that Complainant had a history of not maintaining a professional demeanor in the office. In light of that history, the Enforcement Supervisor determined that the LOW was warranted.

Work Outside the Scope of Position Description

The record reflects that all ISAs perform a variety of technical and clerical support for the Enforcement Unit. The major duties of the position include: (1) assisting investigators in developing a variety of evidentiary materials surrounding charges; (2) interviewing charging parties and witnesses; (3) securing needed information and documents received by the Unit; (4) reviewing information regarding timeliness, bases, and standing under the federal discrimination laws; (5) securing information from potential charging parties; (6) interviewing potential charging parties in depth; (7) drafting charges of employment discrimination and required affidavits; (8) summarizing and compiling comparative employment data used to examine and evaluate respondent's practices in order to identify trends that indicate discriminatory practices; and (9) typing a variety of materials such as investigative reports, memoranda, letters, charges, and other related documents into final form.

Complainant claims that she has been performing higher-level duties that support a higher grade and pay. She states that she does all of her duties as an ISA and provides relief to the OAA and Receptionist. She also contends that she performs the complex duties of an Investigator and has been since becoming an ISA in 2008.

On July 8, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her as articulated in the statement of "Issues Presented" above. At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). Therein, the Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

Complainant did not submit a statement in support of her appeal. The Agency filed a brief in opposition to the appeal requesting that the Commission affirm the Agency's FAD as Complainant failed to meet her burden of establishing that the Agency's articulated reasons for its actions were pretext for unlawful discrimination.

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 Chap. 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

Disparate Treatment

In the absence of direct evidence of discrimination, the allocation of burdens and order of presentation of proof in a Title VII case alleging discrimination is a three-step process. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973); see Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318 (D. Mass. 1976), *aff'd* 545 F.2d 222 (1st Cir. 1976) (applying McDonnell Douglas to retaliation cases). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. 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, 441 U.S. at 802 n.13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas 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 Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr v. Hicks, 509 U.S. 502, 519 (1993).

Non-selection

The record is clear that Complainant's name was not on the certificate. Complainant did not meet the 97-point cut off score for the position, and she also failed to submit her most recent performance appraisal. As was noted above, Complainant's score was 92. Report of Investigation (ROI) at 240. The Selecting Official stated that because Complainant's name was not on the certificate she "could not be considered" for the position. ROI at p. 246. The Selecting Official also stated that C1, the ultimate selectee, was the only applicant interviewed. C1, according to the Selecting Official, was a VISTA candidate, which he maintained is "like a Peace Corps candidate: if there is a vacant position in the federal government, they can submit an application and resume without going through the certification process." *Id.* No candidate from the certificate was selected or interviewed.

Letter of Warning

Record evidence establishes that Complainant has been counseled on several occasions about a pattern of "unprofessional office conduct" and that the LOW was issued because of her continued display of inappropriate office behavior. In October of 2014, Complainant was involved in an incident where she told a police officer delivering correspondence to the Raleigh Office in the course of his official duties to "get his White ass out of here." This incident was followed by the inappropriate comments she provided to a Charging Party on March 17, 2015, and her refusal to comply with S2's order to leave the room, choosing instead to become loud and belligerent in the presence of the Charging Party. The final incident involved Complainant losing her composure and cursing at a co-worker, on or around March 26, 2015. Upon issuance of the LOW to Complainant, the Enforcement Supervisor advised her that the letter would not be placed in her

Official Personnel File, but that future deficiencies would result in more severe disciplinary action being taken against her, up to and including removal.

Work Outside Duties of the Position

It does not appear that Complainant was performing any tasks that were outside the duties she was required to perform as part of her position as an ISA. Management asserts that Complainant was only tasked with responsibilities that were required of her job title, and within her job description.

Assuming, arguendo, that Complainant established a prima facie case of discrimination based on race and reprisal for prior EEO activity, we find that the Agency articulated a legitimate, non-discriminatory reason for each of the alleged discriminatory actions as articulated above. The record is devoid of any evidence that any of the Agency's actions were motivated by discriminatory animus. Complainant offers nothing on appeal to rebut any of the Agency's asserted reasons. In sum, our review of the record confirms that the actions of Agency management in the instant matter were based on its determination of how best to effectively manage the workplace environment. Complainant was unable to establish that the Agency's actions in this matter were motivated by discriminatory animus. The Commission has long held that an Agency has broad discretion to set policies and carry out personnel decisions and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259).

Harassment

With respect to Complainant's contention that she was subjected to a hostile work environment with respect to the matters set forth in her complaint, we find that under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), Complainant's claim of hostile work environment must fail. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994). A finding of a hostile work environment is precluded by our determination that Complainant failed to establish that any of the actions taken by the Agency were motivated by discriminatory animus. See Oakley v. United States Postal Service, EEOC Appeal No. 01982923 (Sept. 21, 2000).

CONCLUSION

Based on a thorough review of the record, we find that the Agency properly determined that Complainant did not demonstrate that she was subjected to unlawful discrimination and harassment based on her race and in reprisal for prior EEO activity. Accordingly, we AFFIRM the Agency's FAD.

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 (S0610)

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 (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:

/s/ Bernadette B. Wilson
Bernadette B. Wilson
Executive Officer
Executive Secretariat

November 26, 2019
Date