



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

[REDACTED]
Brook V.,¹
Complainant,

v.

Kirstjen M. Nielsen,
Secretary,
Department of Homeland Security
(Immigration and Customs Enforcement),
Agency.

Appeal No. 0120172064

Hearing No. 460-2016-000169X

Agency No. HS-ICE-23821-2015

DECISION

On May 26, 2017, 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 May 26, 2017 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., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Immigration Enforcement Agent at the Agency's Central Detention Facility (CDF) in Houston, Texas.

Complainant had been assigned to work from 8:00 a.m. to 4:00 p.m. On March 30, 2015, the Agency announced that it was undergoing organizational changes and the employees of the CDF were going to be merged into the Criminal Alien Programs (CAP).

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.

The Supervisor (Hispanic, male, unknown disability status) sent out an email indicating that there would be new work shifts: 6:00 a.m. to 2:00 p.m., 7:00 a.m. to 3:00 p.m., 2:00 p.m. to 10:00 p.m., and 10:00 p.m. to 6:00 a.m. The Supervisor asked employees to indicate their first and second preferences.

Complainant responded with her first preference for the 7:00 a.m. shift and a second preference for the 2:00 p.m. shift. On April 7, 2015, the Supervisor announced the assignments based on the new shifts. Complainant was assigned to the CAP Outlying Jails/Federal Duty Station on the shift beginning at 2:00 p.m., based on her seniority date of February 19, 2012.

Complainant believed the assignment constituted discrimination. On July 16, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female), and disability (husband's medical condition) when, on April 17, 2015, Complainant was notified that her duty hours and location would change effective the end of the quarter.

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 Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing, but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

Complainant appealed. She indicated that the attorney who represented her before the hearing coerced her into withdrawing the hearing request. As such, Complainant requested that her hearing request should be reinstated. The Agency argued that Complainant's appeal request was based on her representative's actions. The Agency asked that the Commission reject Complainant's request and affirm its final decision finding no discrimination.

ANALYSIS AND FINDINGS

Coercion Regarding Withdrawal of Hearing Request

As an initial matter, Complainant requested that the Commission vacate the Agency's final decision and remand her complaint for a hearing. She argued that her attorney at that time had coerced and misled her into withdrawing her hearing request. The Commission examines coercion claims with close scrutiny. The party raising coercion must show that there was an improper threat of sufficient gravity to induce assent to the agreement and that the assent was in fact induced by the threat. Such a threat may be expressed, implied or inferred from words or conduct, and must convey an intention to cause harm or loss. A complainant's bare assertions will not justify a finding of coercion. Lenihan v. Dep't of the Navy, EEOC Request No. 05960605 (Dec. 5, 1995)

Here, Complainant had an attorney who represented her before the AJ. She asserted without specificity that she was threatened by the Attorney. She has not argued nor does the record indicate that the Agency was involved in her decision to waive her right to a hearing. We find that Complainant has not provided the Commission with anything beyond her bald assertion. As such, we find that Complainant has not shown that she has been subjected to coercion when she withdrew her hearing request. Therefore, we are not persuaded by Complainant's claim to remand the matter for a hearing.

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").

Disparate Treatment

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to prevail, he or she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, *i.e.*, that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). 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). Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the Agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't. of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't. of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't. of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Upon review of the record, we find that the Agency provided legitimate, nondiscriminatory reason for its action. The Supervisor averred that the Agency had a reorganization and the employees were asked to provide their shift preference. The Supervisor indicated that he could not grant Complainant her first shift preference based on her seniority. As such, she was assigned her second preference to the 2:00 p.m. shift. He noted that another employee with more seniority was also assigned the 2:00 p.m. shift. Finding that the Agency has met its burden, we turn to Complainant to show that the Agency's reason was pretext for discrimination based on her sex and/or race. We find that Complainant has failed to do so.

Disability

Finally, Complainant asserted that the Agency's action did not allow her to take her husband to his appointments or allow her to drive her kids to various events. However, the Rehabilitation Act does not impose such obligations on employing agencies. Rather, an Agency is required to make reasonable accommodation to the known physical and mental limitations of its otherwise qualified employees or applicants for employment with a disability. The Commission has held, however, that individuals with a relationship or association with a person with a disability are not entitled to receive reasonable accommodations. EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act at n. 5 (Oct.17, 2002). Furthermore, Complainant stated in her affidavit that she does not believe that her husband's medical condition played a role in the Agency's decision. As such, we find that Complainant has not shown that the Agency's actions constituted a violation of the Rehabilitation Act.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision.

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)

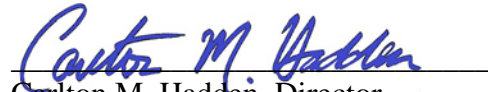
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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:

A handwritten signature in blue ink, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

December 4, 2018

Date