



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

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Carolyn M.,<sup>1</sup>  
Complainant,

v.

Megan J. Brennan,  
Postmaster General,  
United States Postal Service  
(Pacific Area),  
Agency.

Appeal No. 0120181158

Hearing No. 480-2014-00681X

Agency No. 4F-956-0026-14

DECISION

On February 12, 2018, 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 December 8, 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Sales, Services/Distribution Associate, PS-06, at the Agency's Downtown Station facility in Fresno, California.

On December 18, 2013, believing she had been subjected to discrimination, Complainant contacted the EEO counselor. On March 18, 2014, when the matter was not resolved informally, Complainant filed an EEO complaint alleging she had been discriminated against her on the bases of race/national origin (African-American), color (Black), sex (female), religion (Baptist),

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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.

age (55), and/or reprisal for prior protected EEO activity when, effective November 4, 2013, Complainant was removed from her position with the Agency.

The Agency accepted the complaint and conducted an investigation. During the investigation, Complainant refused to provide the EEO investigator with an affidavit to support her claim of discrimination or retaliation. In her affidavit, Complainant's supervisor ("Supervisor") (55-year-old Caucasian female, Christian) stated that on June 11, 2013, she was told that a stack of blank money orders was found in the mail processing area. The money orders had been assigned to Complainant and clerks reported that they found them "all over in the mail." Later that month an audit revealed discrepancies of \$98 and \$102 in accounts assigned to Complainant. During this same period, Agency management learned that Complainant failed to change the PO box locks on approximately 260 boxes between June 2011 and June 2013. It was also discovered that she also failed to follow the proper procedures for receiving payment for box rents from customers.

The Agency's Office of Inspector General (OIG) investigated and confirmed these alleged breaches of fiscal responsibility by Complainant. The OIG report stated that Complainant was contacted but refused to participate. Subsequently, in July 2013, the Supervisor met with Complainant with her shop steward present as part of a pre-disciplinary fact-finding investigation. The Supervisor indicated that Complainant confirmed her failure to maintain the security of the money orders, her cash discrepancies, and her inability to handle the PO boxes. Based on these events, on September 24, 2013, the Supervisor issued Complainant a Notice of Removal. The Manager (44-year-old Caucasian female) concurred with the removal action. The effective date of the removal was November 4, 2013.

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 requested a hearing.

Following the AJ's issuance of an order authorizing discovery by both parties, the Agency filed a motion to sanction Complainant for her failure to provide an affidavit or other sworn statement indicating the factual bases of her claims of discrimination and retaliation, either during the investigation or in response to pre-hearing discovery requests that included a motion to compel.<sup>2</sup> The Agency requested that the hearing be cancelled as the sanction. Complainant filed a response to the Agency's motion. However, the AJ determined that Complainant's response was not in fact responsive to the motion and provided no material information. Instead, Complainant merely asserted that the file contained "everything except testimony from my witness." Based on these circumstances, the AJ determined that the requested sanction was justified, dismissed the hearing and remanded the complaint to the Agency for a final decision based on the investigative record.

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<sup>2</sup> The motion to compel expressly put Complainant on notice that her failure to comply could result in the dismissal of the hearing as a sanction.

Accordingly, 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 and/or retaliation as alleged.

This appeal followed.

### ANALYSIS AND FINDINGS

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”).

#### *Sanction by the AJ*

Commission regulations and precedent provide its administrative judges with broad discretion in matters relating to the conduct of a hearing, including the authority to sanction a party for failure, without good cause shown, to fully comply with an order, including discovery orders. See 29 C.F.R. § 1614.109(e) and (f); Equal Employment Opportunity Commission Management Directive 110 for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 7 (Aug. 5, 2015).

Here, the record fully supports the contention that Complainant refused to provide a sworn statement indicating the factual bases of her claims of discrimination and retaliation either during the investigation or in response to the Agency’s discovery requests. Thus, her failure to comply to the AJ’s discovery order provides justification for the AJ’s sanction. Complainant argues that she never received the Agency’s motion to compel so did not realize that her conduct could result in the cancellation of her hearing. However, the record indicates, and Complainant does not challenge, that her representative<sup>3</sup> received the motion to compel and that it warned her of the possible sanction. Complainant also argues that she did not provide an affidavit in support of her EEO complaint because she feared that the Agency would show the affidavit to management officials. This does not justify her failure as management would clearly be aware of her testimony and other evidence presented at a hearing. Complainant also argued that she has a witness, a white male who lost 69 blank money orders but was not fired. She asserted that the witness needed a “protective order” from the AJ in order to testify so that management was not aware of his testimony. Again, this does not justify Complainant’s failure to provide her own statement. In sum, we conclude Complainant has not established on appeal that the AJ abused his discretion by imposing the sanction of dismissing her hearing request.

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<sup>3</sup> The AJ characterized Complainant’s representative as a “seasoned EEO representative”.

### *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 Supervisor provided legitimate, non-discriminatory reasons for issuing the Notice of Removal. The Supervisor indicated that she was informed that multiple blank money orders assigned to Complainant had been found in the mail stream. In addition, during this same period, an audit showed significant shortages in Complainant's accounts, and a long-term failure to follow proper procedures regarding hundreds of PO boxes. Based on repeated evidence of failure to adequately perform her fiscal duties, the Supervisor decided to terminate Complainant's employment.

In order to prevail, Complainant must prove, by a preponderance of the evidence, that these proffered reasons were pretext masking discrimination and/or retaliatory animus. However, Complainant failed to provide an affidavit or other statement in support of her claims. She also asserted that she has comparator evidence but provided no evidentiary support for her assertion. Accordingly, Complainant has failed to demonstrate that the Agency subjected her to discrimination based on her race, color, national origin, sex, religion, age and/or prior EEO activity as alleged.

## 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:



Carlton M. Hadden, Director  
Office of Federal Operations

May 9, 2019

Date