



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

[REDACTED]
Doretta F.,
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2022004214

Hearing No. 430-2021-00432X

Agency No. 200I-0544-2021101326

DECISION

On July 28, 2022, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 28, 2022, final order 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. For the following reasons, we AFFIRM the Agency's final order.

Complainant worked as a Physician, GS-2210-11, at the Agency's Medical Center in Columbia, South Carolina. On January 29, 2021, Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female), disability², and in reprisal for prior protected EEO activity when:

1. On November 23, 2020, the Team Lead issued Complainant a written counseling;

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 Complainant did not identify any disability during the processing of her complaint. Investigative Report (IR) 96, n. 1.

2. On November 27, 2020, the Team Lead accused Complainant of behaving inappropriately with a patient;
3. On December 2, 2020, the Team Lead issued Complainant a Letter of Decision, Reprimand;
4. On December 16, 2020, Complainant's request for days off was ignored;
5. On December 29, 2020, Complainant's request for a reasonable accommodation was denied; and
6. On January 4, 2021, Complainant was not selected for the position of Chief of Medicine under Vacancy Announcement No. CBTB-10915776-20- SPH.

At the conclusion of the ensuing investigation, the Agency provided Complainant with a copy of the investigative report (IR) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The AJ issued a summary judgment decision in favor of the Agency finding that Complainant was not subjected to discrimination or reprisal as alleged. The Agency subsequently issued a final order implementing the AJ's decision. This appeal followed.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review..."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110), at Chap. 9, § VI.B. (as revised, August 5, 2015)(providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the officials named in the complaint were motivated by unlawful consideration of Complainant's protected classes.

To warrant a hearing on her disparate treatment claim, Complainant would have to satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). As a threshold matter, she would generally have to raise a genuine issue of material fact as to the existence of a *prima facie* case by presenting enough evidence from which to infer that she was subjected to adverse employment actions under circumstances that would support an inference of discrimination.

Furnco Const. Corp. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency articulated legitimate and nondiscriminatory reasons for its actions. See U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983).

As to allegations (1) and (2), the Team Lead averred that she emailed a counseling to Complainant after she received a complaint from an upset veteran. The Team Lead added that the email reminded Complainant of the Agency's Provider's expectation. She later informed Complainant of another general patient complaint and provided Complainant with advice. IR 172, 174. Concerning allegation (3), the Team Lead averred that the reprimand had been prepared by the previous Chief of Primary Care in connection with patient complaints about Complainant's behavior, and that she, as the then-current Chief of Primary Care, merely delivered the letter. IR 175. Regarding allegation (4), the Team Lead averred that Complainant made her leave request to another physician. IR 177. According to email correspondence between Complainant and the Team Lead in March 2021, there was a disagreement between them as to whether Complainant was required to work on the days off that she had requested, namely Christmas and New Year's. IR 145. With respect to allegation (6), the Chief of Staff stated that Complainant completed a telephonic interview which consisted of six standardized questions that were ranked on a scale of one through ten. The Chief of Staff stated that he ranked Complainant at 47, while the other interview panelist ranked her at 43. He affirmed that candidates were expected to score above 50 points to be recommended to the next round. Ultimately, another candidate was chosen based on his leadership experience within the Agency and his interview responses. IR 186-88, 196.

To move forward with a hearing, Complainant must also raise a genuine issue of material fact as to whether the explanations provided by the Team Lead and the Chief of Staff were pretext for discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Hon. Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cnty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). 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. Lorraine D. v. Dep't of Def., EEOC Appeal No. 2022002980 (Oct. 27, 2022).

As to allegation (6), a complainant could demonstrate pretext in nonselection cases by showing that her qualifications for the position were plainly superior to those of the selectee. Sean R. v. Dep't of the Navy, EEOC Appeal No. 2023002252 (Nov. 16, 2023). The Commission notes, however, that agencies have broad discretion to choose among equally qualified candidates as long as the selection is not based on unlawful considerations. Id. The Commission cannot second-guess such personnel decisions unless there is evidence of a discriminatory motivation on the part of the officials responsible for making those decisions. Id. citing Burdine, supra, 450 U.S. at 259. Here the record demonstrates that Complainant was considered to be among the best-qualified candidates for the position. But when asked why she believed that her race, sex, and EEO activity were factors in her non-selection, her only response was that she was not selected because she was a Black female who the Agency had retaliated against. IR 129.

She has not presented any documentary or testimonial evidence tending to show that her qualifications were plainly superior to those of the selectee.

Regarding Allegations (1) through (4), other indicators of pretext include discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, unequal application of Agency policy, deviations from standard procedures without explanation or justification and inadequately explained inconsistencies in the evidentiary record. Tammy S. v. Dep't of the Army, EEOC Appeal No. 2021000578 (May 5, 2022). Again, when asked to explain why she believed that her race, sex, and prior EEO activity were factors in these incidents, Complainant merely repeated that she had been subjected to a hostile work environment due to those considerations. IR 122-24, 126. Beyond these, her own assertions, Complainant has presented neither affidavits, declarations, or unsworn statements from witnesses other than herself nor documents which contradict or undercut the Agency's explanations for any of the incidents at issue. Likewise, she has not presented any evidence which would call the truthfulness of the Team Lead or the Chief of Staff as witnesses or which would tend to establish the existence of at least one of the indicators of discriminatory or retaliatory motivation listed above. Complainant's subjective belief, however genuine, does not constitute evidence of unlawful animus. Stacie D. v. Dep't of the Navy, EEOC Appeal No. 2022003616 (May 18, 2023).

Concerning allegation (5), to merit a hearing on whether she was denied a reasonable accommodation, Complainant must raise a genuine issue of material fact as to whether: (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a ““qualified” individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide her with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002); Nubia H. v. U.S. Postal Serv., EEOC Appeal No. 0120162568 (March 27, 2018). As noted above, Complainant never specified her disability and consequently, failed to raise a genuine issue of material fact with respect to the first two elements of her reasonable accommodation claim. IR 5, 39, 96. Notwithstanding, the record reveals, however, that Complainant requested a parking space and wheelchair which were approved by the Team Lead on February 18, 2021. IR 179-80, 202-04. Complainant presented no evidence showing that the granted accommodations were ineffective.

To the extent that Complainant is alleging that the above-listed incidents are part of a hostile work environment, we find that under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) that Complainant's claim of discriminatory harassment must also 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 raise a genuine issue of material fact as to whether considerations of Complainant's race, sex, or previous EEO activity factored into any of those incidents. Barbara S. v. Dep't of the Army, EEOC Appeal No. 2022000123 (Sept. 5, 2023).

Ultimately, we agree with the AJ that Complainant failed to establish the existence of an evidentiary dispute sufficient to give rise to a genuine issue of material fact. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant's favor. Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged. Accordingly, we AFFIRM the Agency's final order adopting the AJ's decision.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 their 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

January 29, 2024

Date