



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

[REDACTED]
Linn A.,¹
Complainant,

v.

Pete Hegseth,
Secretary,
Department of Defense
(Defense Commissary Agency),
Agency.

Appeal No. 2022005075

Hearing No. 430-2021-00129X

Agency No. DECA-00035-2020

DECISION

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 August 25, 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. For the following reasons, we AFFIRM the Agency's final order.

ISSUES PRESENTED

The issues presented are: (1) whether the EEOC Administrative Judge's grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing; and (2) whether

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 Agency discriminated against Complainant based on race, sex, and in reprisal for protected EEO activity.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Nutritionist, GS-0630-13, at the Agency's Sales, Marketing and Policy Group, Business Development Directorate, Shopper Insights Division in Fort Lee, Virginia. She was directly supervised by the Director of Sales. The Executive Director, Sales, Marketing, and Logistics (Executive Director)² served as Complainant's second level supervisor.

On February 25, 2020, Complainant filed an EEO complaint, subsequently amended, alleging that the Agency discriminated against her. The Agency ultimately framed the complaint in the following manner.

- A. Was Complainant discriminated against and harassed based on sex (female) and race (Asian) when since 2015, and continuing to the present, "barriers" have been placed in Complainant's way in an effort to encourage her to quit her job. Examples include, but are not limited to:
1. Requiring prior legal review and approval of Dietitian postings/writings;
 2. The Executive Director permitted modifications to Complainant's writings/posts without notification;
 3. Post Agency downsizing, Complainant's title was changed from Dietitian to Nutritionist;
 4. The Executive Director permitted a retired Agency employee to yell at Complainant without objection, stating, "You just have to get used to [him];"
 5. For a period of six weeks, the Agency elevator TVs posted the previous Agency Dietitian's photo as opposed to Complainant's;
 6. Removal of Complainant's manager title and replaced with "mere point of contact" title; and

² During the relevant period, the named management official held multiple titles including Chief Performance Officer, Executive Director, Chief of Staff, and Deputy Director. For purposes of the decision, he will be referred to as Executive Director.

7. The Executive Director failed to hold anyone accountable when Complainant presented the aforementioned "barriers" to him. In November 2019, the Executive Director made disparaging remarks about Complainant's work and modified her agreement with Fort Lee culinary partnership resulting in excessive, unfair demands of Complainant.
- B. Was Complainant discriminated against in reprisal for prior protected EEO activity when in May 2020, the Executive Director delayed the investigation and processing of Complainant's sexual harassment complaint and failed to immediately remove Complainant from the Director of Sales' chain of command, despite repeated requests.

Claims A1 and A2

Complainant claimed that prior to her hire, employees were allowed to directly write newsletters, news releases, and posts on social media materials. See Report of Investigation at 569-570. Complainant alleged that after she was hired, management informed her that all social media posts required review by the Office of General Counsel (OGC). Complainant stated that she was never shown any policies and procedures as far as this requirement. She surmised that "this may have been because the social media page was owned by the Business Development Team (BDT) and the [Office of Communications (OC)] could not use the BDT to create additional burdens and requirements like they did for the website and the news releases." Id. at 569

Agency officials responded that all information must be reviewed by OGC prior to release outside of the Agency. According to the Director of Sales, the OC made changes to some of Complainant's writings to fit their Associated Press style of writing and/or to meet page limitations, but the changes were not substantive. ROI at 884-885. The Director of Sales added that Complainant's issues with the OC were ongoing, and that Complainant complained of any changes the OC made or even suggested regarding Complainant's writings and posts. He stated that there was constant friction, but he did not find evidence that anyone in the OC was discriminating against Complainant or trying to sabotage her.

Claim A3

In 2015, Complainant complained about her title being referred to as Nutritionist rather than Dietitian. At the time of her hire, Complainant's position description listed the official title as Nutritionist with an organizational title of Dietitian, GS-13. ROI at 407. Complainant's position was subsequently upgraded from a GS-13 position to a GS-14 position, however, her position title and series remained as Nutritionist. ROI at 469.

The Executive Director explained that there were discussions at different points regarding whether Complainant's title should be Nutritionist or Dietitian. ROI at 201. The Director of Human Resources (HR Director) added that the duties that Complainant performed were those of a Nutritionist and emphasized that Dietitians typically worked at medical facilities. While the HR Director acknowledged that Complainant could be referred to as a registered Dietitian since she was one, the HR Director advised management to refer to Complainant as a Nutritionist because the office lost its dietary mission several years ago. *Id.* at 265-266.

Claim A4

Complainant alleged that when she started in her position, an OC staff member screamed at her, telling her that she should not have been hired and demanding that she prove that she was a Dietitian. ROI at 10. Complainant stated that the Executive Director told her to give the employee a chance and that once Complainant got to know the employee, "he is a big, huge teddy bear." *Id.* The Executive Director, however, denied having knowledge of the incident. ROI at 907.

Claim A5

According to Complainant, in May 2015, the Corporate Communications/Audiovisual team placed a picture on the Agency TV informing Headquarters staff to contact them if they needed a new official photograph. ROI at 10. Complainant stated that the picture that was chosen to be displayed was that of her predecessor. *Id.* Complainant stated that other employees discussed that the picture was used as an effort to be "petty and mean," and remained for an additional four to six weeks after Complainant's supervisor reached out to have the picture removed. *Id.*

The Visual Information Specialist affirmed that he selected the picture that was displayed. ROI at 1082-1084. He stated that he chose the picture at issue because the individual had recently left the Agency, and he felt that using a current employee might cause conflict. Id. The Visual Information Specialist explained that he was asked to remove the picture after a few weeks without explanation. When questioned why Complainant's picture was not used, he noted that Complainant requested to retake her photo and never rescheduled. ROI at 1084.

Claim A6

Complainant alleged that in 2018, her title changed to Dietitian/Health and Wellness Program Manager. ROI at 583. She stated that during that time, a press release indicated that her title changed to read Nutritionist/Health and Wellness Point of Contact. Id. Complainant asserted that she was opposed to the title change because it was professionally embarrassing, as it was a demotion from a registered Dietitian to a point of contact. ROI at 584.

Claim A7

Complainant alleged that in 2019, during an office visit with the Senior Enlisted Advisor to Joint Chiefs of Staff, the Executive Director stated that Complainant would "talk your ear off. She has taken up enough of your time." ROI at 586. Complainant averred that shortly after the meeting, the Executive Director commented that Complainant "was well behaved" during the meeting. ROI at 892, 916.

Complainant also alleged that following an agreement to enter a partnership with the Joint Culinary Center of Excellence, the OC placed unreasonable and excessive requirements, which she characterized as an "insult" and "beyond insane." ROI at 1026. The partnership ultimately ended on the grounds that the requirements were beyond what the Joint Culinary Center for Excellence could support. ROI at 10.

A witness stated that she did not interpret the comments as condescending, derogatory or negative at the time because the Executive Director was continually heaping praise upon Complainant for a "job well done." ROI at 19. The witness recalled that the Executive Director and Complainant were bantering back and forth with one another good naturedly.

Claim B

Complainant alleged that on May 19, 2020, a coworker informed the Executive Director that the Director of Sales had repeatedly sexually harassed Complainant by engaging in activities, such as commenting on Complainant's form fitting clothes and telling Complainant that he could not stand up from the desk when she wore certain items. Complainant stated that she attempted to contact the Executive Director telephonically on May 20, 2020, to discuss the issue with him. However, she was unable to reach him, and he never returned her call. ROI at 644-646.

Complainant claimed that over the course of the next two weeks, the Executive Director told her, via emails, that an investigation had been started and that he would be issuing guidance soon on how she and the Director of Sales were to communicate. Upon receipt of the guidance on May 29, 2020, Complainant learned that she was still in the Director of Sales' chain of command. Complainant stated she remained in the Director of Sales' chain of command until either August 5 or 6, 2020. ROI at 646, 653-655, 657.

The record shows that in May 2020, Complainant's coworker reported that the Director of Sales made jokes and sent inappropriate text messages to Complainant. ROI at 1179, 2084-2086. In response, the Executive Director met with HR for guidance. *Id.* at 2085.

On May 20, 2020, the Executive Director followed up with Complainant's coworker, who informed him that the Director of Sales was a "predator" and sexually harassing Complainant. ROI at 2085-2086. The Executive Director contacted Human Resources again and was directed to contact the EEO Director.

On May 21, 2020, the Executive Director consulted with the EEO Director, the HR contact, and General Counsel. ROI at 2086. The parties agreed that there should be an investigation into the claims of sexual harassment involving Complainant and the reports of a toxic work environment in the Marketing Directorate.

On May 22, 2020, the Agency widened the scope of the internal investigation that was being initiated into the alleged workplace violence incident between Complainant and another employee to include Complainant's sexual harassment allegations against her supervisor and the toxic workplace allegations.

On May 28, 2020, the Executive Director received a zip file containing alleged proof of sexual harassment on the part of the Director of Marketing via inappropriate text messages. ROI at 676, 728, 928.

On May 29, 2020, the Executive Director issued the Director of Marketing a limited no-contact order regarding his contact with Complainant and the Health and Wellness Coordinator. ROI 929. Communications were limited to official email and official supervisory or business-related communications with a courtesy copy to the Director of Sales. The supervisor was restricted from telephone, text, and other messaging.

The Executive Director explained that he believed that the limited no-contact order, combined with the parties' status on telework, would be an effective measure to prevent any further sexual harassment during the investigation.

On July 29, 2020, Complainant gave a statement as part of the investigation into the sexual harassment complaint. ROI at 2698. Complainant stated that she had not had any communication with her supervisor that was not a business necessity since the no-contact order was put in place. Complainant affirmed that all communication took place via email and included the Director of Sales

On August 3, 2020, Complainant expressed concerns about remaining under her supervisor's chain of command after reporting that he had sexually harassed Complainant. ROI at 964.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Complainant's September 2, 2021, motion for a decision without a hearing and issued a decision without a hearing on August 24, 2022.

Regarding Complainant's harassment claims, the AJ found that Complainant had various acrimonious relationships in the workplace, and that she took considerable umbrage with efforts to manage her work. Ultimately, the AJ determined that the record was void of evidence that the Agency's actions were due to her sex, race, or in reprisal. The AJ noted that Complainant's allegations, even if accurately described, were not severe or pervasive enough to establish a hostile work environment.

With respect to reprisal, the AJ found no nexus between the Agency's actions and Complainant's protected basis. The AJ determined that the investigation into Complainant's allegations began almost immediately upon receipt by management. Moreover, the AJ found no evidence of improper motive on the part of the investigator regarding the investigation into Complainant's allegations being conducted in tandem with allegations against Complainant.

Complainant was not removed from the supervision of the Director of Sales due to fact specific circumstances, which the AJ found were reasonable under the circumstances. Specifically, the supervisor was issued a non-essential business no-contact order, essential communication was monitored, and the parties were never physically together because of telework. Complainant also confirmed that the no-contact order was not violated.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant argues that her predecessor, who is Caucasian, was not required to submit her content for legal review; management habitually failed to intervene on Complainant's behalf; and management failed to fix the issue of her title change. Complainant further contends that management officials defended her male coworkers and did nothing when Complainant was screamed at and had her title changed. Complainant reiterates her belief that the Executive Director made stereotypical comments based on her protected classes. Complainant argues that she established a valid claim of reprisal and that she established the requisite nexus between her protected activity and adverse treatment.

According to Complainant, the Agency violated its own sexual harassment policy when it failed to remove Complainant from her harasser's chain of command. Complainant asserts that the AJ's findings regarding the motive of the investigator was irrelevant because he was not the decision-maker in combining the sexual harassment investigation with the workplace violence complaint. Complainant maintains that the Executive Director's actions were taken months following her complaint against him and would deter a reasonable person from reporting allegations of sexual harassment.³

³ We note that Complainant filed a supplemental brief on December 19, 2022, nearly two months after she submitted her initial brief. As this brief was filed

The Agency opposes the appeal and argues that Complainant failed to persuasively show that her allegations in A1 to A7 were causally related to her protected bases. Additionally, the Agency argues that management took prompt and effective action to respond to Complainant's claim of sexual harassment by putting in place a limited no contact order between Complainant and the Director of Sales.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, 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").

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. (Aug. 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*).

more than 30 days from the date that she filed her appeal, we find it to be untimely and will not consider it. See 29 C.F.R. § 1614.403(d).

ANALYSIS

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 Agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor. Accordingly, we find that the AJ properly issued a decision without a hearing.

Harassment Based on Race and Sex

In order to establish a prima facie case of harassment, a complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that they are a member of a statutorily protected class; (2) that they were subjected to unwelcome conduct related to their protected class; (3) that the harassment complained of was based on their protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with their work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982), approved in Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67 (1986); see generally Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).; Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).

In other words, to prove her hostile work environment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis; in this case, her race and sex. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

Having reviewed the record, we find that the AJ correctly determined that Complainant did not establish that she was subjected to unlawful harassment. With respect to the “barriers” Complainant presented, we find that those allegations relate to common workplace occurrences and personality conflicts. The Commission has held that routine work assignments, instructions, and admonishments do not rise to the level of harassment because they are common workplace occurrences. See Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010).

Unless it is reasonably established that the common workplace occurrence was somehow abusive or offensive, and that it was taken in order to harass Complainant on the basis of her protected class, we do not find such common workplace occurrences sufficiently severe or pervasive to rise to the level of a hostile work environment or harassment as Complainant alleges. See Complainant v. Dep’t of Vet. Affs., EEOC Appeal No. 0120130465 (Sept. 12, 2014). In this case, we find that the complained of conduct, such as reviews of writings, title changes, and coworker comments were related to the management of Complainant’s assignments, performance, and interpersonal conflicts. The evidence in the record does not support Complainant’s insistence that the alleged incidents of harassment were due to any of her protected bases and therefore Complainant has not established that she was subjected to unlawful harassment. See Eryn M. v. U.S. Postal Serv., EEOC Appeal No. 2020004853 (Aug. 25, 2022).

Retaliatory Harassment

As to claim B, concerning her claim of retaliatory harassment, the Commission has held that reprisal claims are considered with a broad view of coverage and that the threshold for establishing retaliatory harassment is different than for discriminatory harassment. Retaliatory harassing conduct can be found even if it is not severe or pervasive enough to alter the terms and conditions of employment. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

To prevail on a claim of retaliatory harassment, a complainant must show that they were subjected to conduct sufficient to dissuade a “reasonable person” from making or supporting a charge of discrimination. See Janeen S. v. Dep’t of Com., EEOC Appeal No. 0120160024 (Dec. 20, 2017) (citing Burlington N., 548 U.S. at 57), req. for recons. den., EEOC Request No. 0520180224 (May 31, 2018); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n.137 (Aug. 25, 2016); Carroll v. Dep’t of the Army, EEOC Request No. 05970939 (Apr. 4, 2000)).

Here, it is undisputed that Complainant engaged in protected activity in February 2020, and the Executive Director indicated that he was aware of Complainant's protected activity. ROI at 922. However, the record is devoid of evidence showing that the Executive Director responded to Complainant's allegations of sexual harassment inappropriately based on Complainant's protected activity. To the contrary, the record shows that the Executive Director immediately reported the alleged sexual harassment after receiving the report of sexual harassment from Complainant's coworker. *Id.* at 2085. Additionally, the record is consistent with Agency testimony that a no-contact order was put in place shortly after the allegations arose. *Id.* at 1764. Moreover, Complainant affirmed that the no-contact order was not violated. ROI at 2698. Accordingly, we agree with the AJ that the requisite nexus fails to exist between Complainant's protected activity and the actions at issue.

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 order.

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).

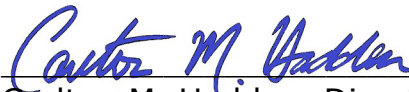
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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

February 6, 2025
Date