



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

Erin Dailey a/k/a
Maria M.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 2022005111

Agency No. HS-TSA-01138-2022

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 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. For the following reasons, we AFFIRM the Agency's final decision.

ISSUES PRESENTED

The issues presented concern whether the Agency discriminated against Complainant on the basis of sex (female) when she was subjected to a hostile work environment and various acts of discrimination.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Transportation Security Officer at the Logan International Airport in Boston, Massachusetts.

On March 22, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the basis of sex (female) when:

1. from October 12, 2021 to February 2022, management officials directed Complainant to wear her face shield;
2. on or around February 12, 2022, the Transportation Security Manager (Manager) did not provide Complainant a requested face shield;
3. on February 14, 15, and 20, 2022, a management official audited Complainant at the x-ray position; and
4. on March 1, 2022, a management official required Complainant to use annual leave instead of Weather and Safety Leave.

At the time of events, the relevant responsible management official was the Transportation Security Manager (Manager).

Claim 1

The Agency issued an administrative directive for "Face Masks in all [Agency] Facilities-Revision 3" (Face Shield Policy), which became effective on December 8, 2021. The policy stated in part,

[Agency] employees and contractors who are not fully vaccinated, including those with pending requests for medical or religious exemption, must: wear a face shield in addition to a properly worn surgical masks when indoors at all federal facilities and operational locations, including common areas, hallways, cubicles, and conference/team rooms. (Note: fully vaccinated employees continue to have the option of wearing face shields in addition to surgical masks but are not required to do so).

Report of Investigation (ROI) at 377.

Complainant asserted that the Manager required her and another unvaccinated female Transportation Security Officer (TSO1) to wear a face shield but did not require unvaccinated male employees to do the same. ROI at 55. TSO1 confirmed Complainant's allegation that the Agency required all employees to wear a face shield, but that the Manager and another male employee, TSO2, hardly ever followed the rule. ROI at 103.

The Manager, however, denied giving anyone permission to not wear a face shield. The Manager stated that he both required and complied with the Face Shield Policy. ROI at 73. TSO2 stated that he was directed by the Manager to wear a face shield per policy. ROI at 98.

Claim 2

Complainant stated that at the beginning of her shift, she and TSO1 requested a new face shield from the Manager. Complainant maintained that she showed the Manager her bent face shield and asserted that it would have been unsuitable to wear. Complainant indicated that the Manager asked her to "give him a moment" and then directed them to go back out to the floor. Complainant recalled that approximately two hours later, the Supervisory Transportation Security Officer (STSO1) approached her and TSO1 and directed them to wear their face shields. Complainant informed STSO1 of her earlier request, showed STSO1 the bent face shield, and then put it on. ROI at 57.

The Manager acknowledged that he did not provide Complainant with a new face shield in a timely manner. However, he denied that her sex was a factor in this incident. The Manager conceded that he informed Complainant to give him a minute but that it turned to hours before he remembered. He noted that he became preoccupied with two time sensitive tasks and simply forgot. He noted that Complainant could have reminded him again of her request or could have gone to one of the other four/five supervisors that day. ROI at 74.

Claim 3

Complainant alleged that she was audited on three separate occasions within a one week timeframe. She was embarrassed by the audits and claimed that she and TSO1 were the only officers audited. ROI at 59. TSO1 confirmed that Complainant was randomly audited. ROI at 104.

Audit documentation also showed that STSO1 conducted audits on February 14, 20, and 21, 2022, on several TSOs, including female and male officers. ROI at 116; 148.

The Manager stated that management used to conduct daily pat downs, but that Boston leadership discontinued this to reduce physical contact in response to the increased transmission rates of COVID-19. The Manager noted that due to this, they began x-ray audits in February 2022. ROI at 75. STSO1 stated that it was planned audits for all employees. ROI at 82.

Claim 4

Complainant alleged that on February 26, 2022, she could not make it to work because her street had not been plowed yet from an earlier snowstorm. She submitted a request for Weather and Safety Leave (WSL) because she did not have enough sick or annual leave to cover the time. ROI at 61.

The Supervisory Transportation Security Officer (STSO2) stated that Complainant called out during a snowstorm. While she requested WSL, the Manager denied the request because WSL, per the Human Capital Advisory Memorandum, is approved only under limited circumstances. He noted that when someone calls out, employees are made to use sick or annual leave instead. ROI at 94. The Manager stated that he did not recall the exact day, but that WSL was used during peak COVID-19 transmissions but would otherwise not have been available except for limited circumstances. ROI at 76.

The Human Capital Advisory Memorandum stated that:

Employees identified as having been in a close contact exposure to COVID-19 in the workplace may be approved for weather and safety leave depending on their vaccination status.

ROI at 391

There is no indication that WSL was created for weather-related leave requests like snowstorms.

Post Investigation

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). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b), which concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant reasserts previously made statements and reiterates that management treated her differently based on sex. The Agency opposes the appeal and urges the Commission to affirm its final order.

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").

ANALYSIS

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For a complainant to prevail, they 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, n. 13; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

In order to establish a prima facie case of discrimination based on sex, a complainant must show: (1) they are a member of a protected group; (2) they were subjected to an adverse employment action; and (3) they were treated less favorably than other similarly situated employees outside of their protected groups. We note that, although a complainant bears the burden of establishing a "prima facie" case, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), the requirements are "minimal," St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993), and complainant's burden is "not onerous." Burdine, 450 U.S. at 253.

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Once the agency has met its burden, the 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.

At the outset, we find that Complainant has not established a prima facie case of discrimination based on sex. While it is undisputed that Complainant is a member of a protected class by virtue of her sex and was allegedly subjected to various adverse employment actions, we find that she failed to show that she was treated less favorably than other similarly situated employees outside of her protected groups.

Furthermore, we find that the Agency articulated legitimate, nondiscriminatory reasons for its actions. For claim 1, management officials stated that they were following Agency guidelines that individuals wear face shields due to the COVID-19 pandemic. Regarding claim 2, the Manager acknowledged that he did not timely provide Complainant with a new face shield at the start of her shift due to distractions with other time sensitive tasks. Regarding claim 3, management was conducting x-ray audits on all employees because of a directive to end physical pat downs due to the COVID-19 pandemic. Regarding claim 4, the grant of WSL was for limited circumstances associated with the COVID-19 pandemic, and not for inclement weather-related requests.

Without proof of a demonstrably discriminatory motive, the Commission will not generally second-guess the Agency's personnel decisions. see Chavez v. U.S. Postal Serv., EEOC Appeal No. 0120055246 (Jan. 5, 2007); see also Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1982) (noting that "the question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason [was discriminatory]").

We ultimately find no evidence that Complainant's protected class was a factor. In claim 1, Complainant asserted that only her and TSO1 were required to wear the face shields. However, the record does not support this assertion as both female and male officers were required to wear face shields. In claim 2, while the Manager acknowledged not obtaining a new face shield in a timely manner, there is no indication that Complainant's sex was a factor in this oversight. In claim 3, there is no evidence that Complainant was targeted more frequently than other employees in audits designed for everyone. Lastly, in claim 4, the record demonstrated that WSL was not created for inclement weather-related requests, and that all individuals calling out due to weather related events were made to use sick or annual leave.

At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted based on discriminatory animus. Aside from conclusory statements, Complainant has not provided any evidence connecting the alleged incident with her protected class. Based on the record, we concur with the Agency that Complainant has not met her burden of proving that she was discriminated against as alleged.

Hostile Work Environment

Regarding the allegation of a hostile work environment, as to the claims addressed above, a finding of a hostile work environment is precluded by our determination that Complainant failed to establish that the actions taken by the Agency were motivated by discriminatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

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 (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

December 17, 2024
Date