



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

[REDACTED]
Leora R.,¹
Complainant,

v.

Mark Averill,
Acting Secretary,
Department of the Army,
Agency.

Appeal No. 2023000214

Hearing No. 570-2021-00735X

Agency No. ARCEEUR20JUL02371

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 September 12, 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

Complainant began a three-year tour of duty in the position of District Contracting Chief, Europe District, GS-1102-15, on December 10, 2017. On June 20, 2020, Complainant exercised her return rights to return to the position of Supervisory Contract Specialist, GS-1102-15, located in Fort Worth, Texas.

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.

On August 31, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female), national origin (Australian), age (1966), and in reprisal for prior protected activity² by her direct supervisor, Regional Contracting Chief (S1), United States Army Corps of Engineers (USACE) North Atlantic District (NAD) when:

1. On May 31, 2020, S1 gave her a low performance score on her 2020 performance evaluation, Department of Defense Performance Management and Appraisal Program (DPMAP); and
2. On June 1, 2020, S1 denied her overseas tour request after she expressed concerns during her performance evaluation that she was going to seek assistance from the Human Resources (HR) office in order to file a grievance.

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. The Agency filed a motion for summary judgment. Over Complainant's objections, the AJ granted summary judgment in favor of the Agency.

Regarding claim 1, the AJ found assuming Complainant established a prima facie case of discrimination, the Agency articulated a legitimate, nondiscriminatory reason for the overall rating of "3, fully successful." S1 rated Complainant "5, outstanding," on four of the elements and "3, fully successful," on the remaining four elements. The AJ noted S2 explained his reasoning for each of the four "3, fully successful" ratings. For example, S1 stated he heard from subordinate staff, partners, and stakeholders that there was "an element of distrust within contracting office and between functional elements of the district and the Contracting Office;" cited Complainant's attempt to reorganize the office structure, which was apparently unsuccessful; noted occasions where supervisors were not allowed in Contracting Officer Review Boards for their employees; and stated he received feedback from employees regarding poor communication and not being heard by Contracting Leadership, which included Complainant. The AJ found despite her arguments to the contrary, Complainant did not present evidence to contradict S1's stated reasons. Further, the AJ noted

² Initially, the Agency dismissed the basis of reprisal for failure to state a claim. However, while the case was pending a hearing, the AJ granted Complainant's motion to amend to include reprisal as a basis.

Complainant's disagreement with S1's rating and the reason behind it was insufficient to show discriminatory animus.

The AJ noted that in an attempt to show pretext, Complainant cited three comparatives who received performance evaluations from S1 in 2020. However, the AJ found the identified comparatives did not demonstrate disparate treatment based on Complainant's protected classes. Specifically, the AJ noted the evidence did not demonstrate the comparatives were similarly situated, in that they received the same types of comments for the same performance yet were treated more favorably than Complainant.

Regarding claim 2, the AJ found assuming Complainant established a prima facie case of discrimination, the Agency articulated a legitimate, nondiscriminatory reason for denying Complainant's extension request. S1 considered various factors, including concerns about Complainant's effective communication with subordinate staff and other Europe District leaders and low morale in the Europe District Contracting Office. S1 stated this affected the Contracting acquisition performance, which in turn hampered mission execution. The AJ noted although Complainant disagreed with S1's reasoning, she did not allege facts sufficient to demonstrate those reasons were a pretext, nor to show that any of her protected characteristics played a role in the decision.

Additionally, the AJ noted Complainant did not identify any comparatives to support her claim of disparate treatment. The AJ stated Complainant's position as the Europe District Contracting Chief was the only GS-15 employee S1 supervised in an overseas location, and as her first level, he did not support her extension request. Colonel was the ultimate decision maker on Complainant's extension request. The AJ noted that Colonel had previously approved two employee extension requests without first level supervisory approval; however, in addition to not having S1's recommendation, Colonel had received complaints from employees under Complainant's supervision about her. The AJ found Complainant did not establish that the employees, whose extension requests Colonel approved without first level supervisory approval, were true comparatives to her; specifically, that they had similar complaints about their performance, yet were still approved for an extension.

Regarding Complainant's claim of reprisal, the AJ found even assuming S1 was aware of Complainant's protected activity, she could not establish a nexus between her EEO activity and either the performance evaluation or the denied extension request. The AJ found over a year and six months

separated Complainant's alleged protected activity and the 2020 performance evaluation and thus, there was no temporal proximity. Further, the AJ noted S1 rated Complainant "5, outstanding" on her 2019 performance, only six months after her alleged protected activity. The AJ concluded that there was nothing else in the record to support a nexus between Complainant's protected activity and the employment actions at issue.

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

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).

Upon review, we find the record in the present case was fully developed. 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 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 fully implementing the AJ's decision finding no discrimination.

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 19, 2025
Date