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

[redacted]
Selma D.,[1]
Complainant,

v.

Thomas J. Vilsack,
Secretary,
Department of Agriculture
(Natural Resources Conservation Service),
Agency.

Appeal No. 2023000267

Hearing No. 410-2019-00453X

Agency No. NRCS-2018-00693

DECISION

On October 14, 2022, 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 14, 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Realty Specialist, GS-1170-09, at the Agency's Real Estate Division in Raleigh, North Carolina. Complainant started the position on November 27, 2017, and she was subject to a two-year trial period.

[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 September 11, 2018, Complainant filed an EEO complaint alleging that she was subjected to discrimination based on race (African-American), disability (fibromyalgia, sleep apnea, osteoporosis, chondromalacia, depression), age (57), and in reprisal for prior protected EEO activity when:

1. On April 19, 2018, she was issued a Notice of Termination During Trial Period which stated her employment with Natural Resource Conservation Service would be terminated effective, April 23, 2018; and
2. Since February 27, 2018, management has failed to approve her reasonable accommodation request for a hardship transfer.

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. Over Complainant's objections, the AJ granted the Agency's July 18, 2022, motion for a decision without a hearing and issued a decision without a hearing finding no discrimination on September 12, 2022. The Agency subsequently issued a final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

Regarding claim 1, Complainant's first-line supervisor (Supervisor-1) issued Complainant a Notice of Termination During Trial Period (Notice) on April 19, 2018. In the Notice, Supervisor-1 stated, "I find that your unacceptable performance or failure to follow instructions and AWOL [Absent Without Leave], standing alone, is cause for termination during your trial period." The Notice included multiple examples where Complainant failed to complete assignments or to respond to communications from colleagues and customers, as instructed. The Notice also explained that Complainant had been AWOL for 68 hours, from April 6, 2018, to the date of the letter. Specifically, Complainant had been absent since March 14, 2018, and Complainant's available forms of leave were completely exhausted by April 5, 2018. The Notice indicated that Supervisor-1 had contacted Complainant twice via letter, sent by post and email on March 22 and 29, identifying the issues with Complainant's leave and instructing Complainant to contact Supervisor-1. Complainant admitted that she did not respond to these letters. Complainant contended that the charge of unacceptable performance was false. Complainant stated that she did not see how she was AWOL since she was getting paid from March 6, 2018, to the date of the letter. Supervisor-1 stated that she received guidance regarding Complainant's leave issues and Complainant's termination from multiple members of human resources.

Regarding claim 2, Complainant emailed Supervisor-1 on February 6, 2018, stating, "This notice serves as my request for a reassignment to Washington DC due necessity for medical reasons. This relocation will afford me the opportunity to maintain a positive balance for both physical and mental stability. This request is for a reassignment date of no later than April 5, 2018." On February 7, Supervisor-1 responded, "Thank you for your request.

I must ask you to please supply the medical documentation to support your request as well as the guidance in the GM [Reasonable Accommodation Guidance Manual] attached. I am available if you have any questions."

On February 15, 2018, Complainant emailed the Reasonable Accommodation Program Manager and explained her situation while asking whether her request for a transfer to receive medical treatment was considered a reasonable accommodation request. The Reasonable Accommodation Program Manager replied:

> Generally, assignments that are offered as part of a reasonable accommodation are due to a physical limitation/impairment that prevents the requesting employee from continuing to perform the essential functions of the job they hold. I will include the process for requesting a reasonable accommodation in case you would like to have your request formally considered/assessed.
>
> Another option you may want to consider is the Agency's Hardship Transfer Program. The POC to obtain additional information is [Branch Chief, Quality Assurance and Workforce Policy], who's information is also included.

On February 27, 2018, Complainant sent the following email to Supervisor-1:

> I reviewed the Reasonable Accommodation document you sent me. However, it does not seem to apply to my situation. So, after some research, I located the attached information pertaining to the Agency's Hardship Transfer Program, which does seem to apply to my situation. In addition, the attached PT in Motion article references the issues with Veterans receiving care in the state of North Carolina, not to mention the VA Hospital is approximately 30 miles away.
>
> I am an 80% Service Connected Disabled Veteran. The Department of Veterans Affairs provides at no cost to me, additional outside medical treatment. However, it's only for the physicians who have agreed to accept payments from the Dept. of Veteran Affairs. Due to this requirement, the medical treatment I require has been extremely limited here in Raleigh. The office here in Raleigh is not commuter friendly, there is no subway/rail system in Raleigh. The required physicians for my medical conditions that are accepting the VA Choice program, are not centrally located, there are less than a hand full available, office hours have been very limited to early evening and no weekend appointments. These restrictions are mentally taking a toll on me and depriving me of the necessary medical treatment I require. My immediate family resides in the Washington DC Metro area, I have no family in Raleigh.

> Being reassigned to Washington, DC will permit me to have access to a wide range of outside specialty physicians encompassing three (3) jurisdictions and a VA Hospital that is on the Metro Rail line, less than 15 minutes from Headquarters. The option of utilizing the Metro Rail line will significantly cut down on my travel time, this mode of transportation will also have a positive impact and contribute to my therapy/treatment as well.
>
> In accordance with Section 316.4-c outlined in the Employee Hardship Request, kindly forward my request and documentation for consideration by the Hardship Committee.

In addition to the news article PT in Motion, Complainant attached a Department of Veterans Affairs Letter (Letter) to the February 27 email. The Letter certified that Complainant was receiving service-connected disability compensation from the Department of Veterans affairs and that Complainant was considered 80 percent service-connected disabled. The only other medical document Complainant provided to management was a doctor's note dated March 14, 2018, that was delivered to Supervisor-1 via email on March 16, 2018. The doctor's note was from the Atlanta VA clinic and stated, "A VA Health Care Professional evaluated this patient for a medical condition. This patient is excused from work/school from 3/14/18 to 6/14/18. PT to follow up w/ her [illegible] as recommended during the above time."

Supervisor-1 stated that she elevated Complainant's February 27, 2018, request to Complainant's second-line supervisor (Supervisor-2) and then was no longer part of the process. Supervisor-2 stated that the task of handling Complainant's hardship transfer request was placed on his schedule, but that Complainant departed, unannounced on March 9, 2018. Supervisor-2 stated that he believed Complainant had quit. Implicit in Supervisor-2's explanation is that he believed it was no longer necessary to process Complainant's hardship request because she was no longer an Agency employee. Supervisor-2 reported that he had many tasks to perform in explaining why he did not forward Complainant's request and documentation to Branch Chief, Quality Assurance and Workforce Policy during the time between Supervisor-1's elevation of Complainant's request and Supervisor-2's belief that Complainant had quit. The record includes two statements providing information consistent with Supervisor-1's belief that Complainant had quit. Supervisor-1 stated, "a couple of folks in the office realized that when [Complainant] took sick leave on March 9, 2018, she actually cleaned out her desk and took all of her personal effects with her and she did not report back to the office." Complainant's coworker and mentor stated, "All I know, I could not tell you what day, I think it was in February 2018. We came in, her desk was cleared off and she was gone."

STANDARD OF REVIEW

The Commission's regulations allow an AJ to grant summary judgment when they find 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 factfinder 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 implementing 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 AJ'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 agency was motivated by discriminatory animus.

ANALYSIS AND FINDINGS

To prevail in a disparate treatment claim such as this, complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he or she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 14. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). 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. See St. Mary's Honor Center 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. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Complainant v. Dep't of Transportation, EEOC Request No. 05900159 (June 28, 1990); Complainant v. Dep't of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Complainant v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Complainant must prove that the employer's reasons are not only pretext but are pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 and 516 (1993). A factual issue of pretext cannot be established merely on personal speculation that there was discriminatory intent. Complainant v. U.S. Postal Service, EEOC Appeal No. 01A11110 (May 22, 2002); Springer v. Durflinger, 518 F.3d 479, 484 (7th Cir. 2008). Pretext means that the reason offered by management is factually baseless, is not the actual motivation for the action, or is insufficient to motivate the action. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000).

In this case, we find that the AJ properly issued a decision without a hearing because no genuine dispute of material fact exists. For purposes of analysis, we assume arguendo that Complainant established a prima facie case of discrimination on the alleged bases. We find that the Agency articulated legitimate, nondiscriminatory reasons for the personnel actions at issue. Regarding claim 1, the Notice cited to Complainant's unacceptable performance, her failure to follow instructions and her AWOL status as the reasons for her termination. Regarding claim 2, Supervisor-2 explained that he did not forward Complainant's February 27 request for hardship transfer because he was busy and then he believed she had quit on March 9.

After a review of the record, we find Complainant failed to show that the Agency's articulated reasons for the discrete adverse employment actions were a mere pretext for discrimination. Complainant argues, in part, that her termination occurred only because she requested to take leave secondary to seeking treatment for her disability and, therefore, the termination occurred because of her disability. The undisputed evidence, however, demonstrates that Complainant's admitted lack of response to inquiries from Supervisor-1 and Complainant's exhaustion of the leave available to her, resulted in Complainant being designated AWOL. Such designation provided one supporting rationale sufficient for Complainant's termination, and it was not related to any protected basis. Regarding claim 2, Complainant contended, in part, that the lack of follow-up regarding her hardship request demonstrated that Complainant's disability was a factor. The foregoing arguments and the evidence of record are insufficient to create a genuine issue regarding discriminatory or retaliatory animus. Complainant's apparent quitting of her job explains the Agency's lack of follow-up of her hardship request. Furthermore, Complainant has not shown that similarly situated people were treated differently.

Reasonable Accommodation

The Rehabilitation Act of 1973 prohibits discrimination against qualified disabled individuals. See 29 C.F.R. § 1630. In order to establish that complainant was denied a reasonable accommodation, complainant must show that: (1) he or she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he or she is a qualified individual pursuant to 29 C.F.R. § 1630.2(m); and (3) the agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (Oct. 17, 2002) (Enforcement Guidance).

Under the Commission's regulations, an agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o), 1630.2(p).

The AJ found that Complainant could not show that the Agency failed to provide her with a reasonable accommodation. We find that Complainant never made a reasonable accommodation request. Complainant made it clear she was not making a reasonable accommodation request, but was instead making a hardship transfer request outside of the reasonable accommodation process.

CONCLUSION

Accordingly, the Agency's final order finding no discrimination is AFFIRMED.

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 31, 2024
Date