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

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

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Federal Emergency Management Agency),
Agency.

Appeal No. 2023000280

Hearing No. 570-2018-01043X

Agency No. HS-FEMA-00087-2018

DECISION

On October 19, 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

Whether the AJ's grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.

[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.

Whether the Agency discriminated against Complainant on the basis of disability.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Cadre of On-Call Response/Recovery Employee (CORE) Emergency Management Specialist in the Individual Assistance Division of the Maryland National Processing Service Center (NPSC), located in Hyattsville, Maryland. On April 17, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against her, based on her disability (severe stomach pains) when: (1) in August and September 2017, Complainant was denied a reasonable accommodation; and (2) on September 26, 2017, Complainant was terminated.

Complainant's duties at the NPSC call center included answering phone calls and taking registrations from disaster survivors, processing registrations for eligibility, indexing documents to applicant files, and taking annual training. In 2017, Complainant's essential functions consisted of five Agency-wide core competencies and four performance goals. Complainant's first-line supervisor (Supervisor1) communicated these performance standards to Complainant on January 25, 2017.

In February 2017, Supervisor1 observed that Complainant's performance had become deficient. On or about February 8, 2017, Supervisor1 told Complainant that Complainant's Transaction Success Rate (TSR) score was 78 percent, below the 87.5 percent required in Complainant's Performance Goal 1. After noticing Complainant's performance was deficient, Supervisor1 attempted to help Complainant improve her performance by scheduling a mentoring and coaching session for Complainant with a subject-matter expert (SME). Complainant participated in the mentoring and coaching session with SME. In SME's after-action report about the mentoring and coaching session, SME detailed her efforts to review Complainant's recent errors with Complainant. SME stated in her report:

> [Complainant] appeared to be defensive throughout the mentoring process and didn't take any real responsibility for the errors we discussed. Her focus was more involved with QC picking on her and that other's [*sic*] aren't doing these things either. Blame was even placed on our applicants. Even when we reviewed the written guidance, it was difficult to get to a level of understanding. It's difficult to offer a suggestion in this situation

> because people are usually receptive to help once they accept that they made a mistake. I didn't find that to be the case in this session. Everything depends on [Complainant] here because only she can accept responsibility and the assistance that is offered to her.

On March 1, 2017, Supervisor1 discussed Complainant's deficient performance with Complainant. On March 28, 2017, the Agency's NPSC Unmet Needs and Overpayment Team emailed Supervisor1 identifying calls in which Complainant did not process cases properly. The Unmet Needs and Overpayment Team explained that while Complainant addressed issues regarding the applicant's personal property, she failed to process the rental assistance for an applicant.

On March 29, 2017, in another attempt to assist Complainant in improving her performance, Supervisor1 met with Complainant and explained that Complainant would complete a special assignment of 16 reviews. As part of this assignment, a group of Quality Assurance Specialists along with Supervisor1 would monitor 16 of Complainant's telephone calls and cases. Supervisor1 told Complainant that to pass the assignment, Complainant had to achieve a passing result in 14 of those calls/cases.

On April 2, 2017, Supervisor1 told Complainant that Complainant was still failing to meet the minimum standard for Performance Goal 1. Between April 3, 2017 and April 13, 2017, Complainant participated in the 16 call assignment. On April 14, 2017, the assessment team completed its review of Complainant's performance during the assignment. Complainant had been unsuccessful in nine casework reviews and one helpline call, for a total of 10 unsuccessful cases/calls out of 16. Supervisor1 reviewed the results of the assignment and determined that 4 of the 10 unsuccessful reviews did not meet the following criteria:

- Agent's action delayed or prevented assistance.
- Agent's action created an over payment or underpayment.
- Agent's action did not follow a procedure mandated by law.
- Agent's action did not follow critical procedural requirements.

Therefore, Supervisor1 considered these reviews successful in the computation of Complainant's TSR for the assignment. In the six unsuccessful cases, Supervisor1 found that Complainant's actions delayed or prevented assistance for disaster survivors in all six cases and that Complainant did not follow a critical procedural requirement in two of the six cases.

Complainant's overall score for the assignment was only 10 successful calls out of 16 for a failing TSR of 62.5 percent.

On April 25, 2017, Supervisor1 submitted her evaluation of Complainant's performance in the first quarter of 2017. By that date, Complainant's TSR score was still under 87.5 percent minimum required. Supervisor1 also noted that Complainant failed to meet expectations for Customer Service and Technical Proficiency. On May 11, 2017, Supervisor1 issued Complainant a memorandum detailing the results of the special assessment. Supervisor1 stated that Complainant's performance was "currently unacceptable" and that she would refer the matter to "the appropriate review officials" for further action.

Around May 15, 2017, Supervisor1 contacted a Human Resources Specialist (HR Specialist) about the appropriate actions to take regarding Complainant's deficient performance. From April to June 2017, Complainant did not achieve expectations in Customer Service or Technical Proficiency. During that quarter, Complainant's TSR also remained at 78.26 percent, below the expected Performance Goal 1 target rate of 87.5 percent. Between July 26, 2017 and August 3, 2017, Supervisor1 told Complainant that she was still failing to meet expectations. On July 19, 2017, HR Specialist contacted Supervisor1 about preparing a termination package for Supervisor1 to review. HR Specialist assisted Supervisor1 in preparing relevant documentation and advised Supervisor1 on her options. Supervisor1 ultimately decided to terminate Complainant.

On September 21, 2017, HR Specialist provided a draft version of the termination notice to Supervisor1 through her second-line supervisor who told Supervisor1 to "ask one of the supervisors to be a part of the meeting and "execute it today if the employee is in the office." On September 26, 2017, Supervisor1 finalized the termination notice and issued the notice to Complainant.

Complainant's Attendance and Leave Requests

In January 2017, Complainant did not take any leave other than paid holiday time off. In February 2017, Complainant requested, and management approved, two hours of sick leave and 15.5 hours of annual leave. In March 2017, Complainant requested, and FEMA approved, four hours of sick leave and 10.5 hours of annual leave. In April 2017, Complainant requested, and management approved, 12.5 hours of sick leave and three hours of annual leave.

In May 2017, Complainant requested, and management approved, 10.5 hours of sick leave and seven and a half hours of annual leave. In June 2017, Complainant requested, and management approved, three hours of sick leave and six hours of annual leave. In July 2017, Complainant requested, and management approved, eight and a half hours of sick leave and seven hours of annual leave.

In August 2017, Complainant started missing work more frequently. From August 14 to August 16, 2017, Complainant missed work without requesting leave in advance. Instead, Complainant called the Agency's Interactive Voice Response (IVR) phone system to indicate her absence from work. The IVR phone system is a tool that NPSC employees across the country are required to use to notify the Agency's Resource Management Unit (RMU), also called the Resource Management Group (RMG), about approved absences. The RMU is responsible for ensuring staffing levels meet and address forecasted workload in both caller services and case processing within targeted average speed of answer and production goals. After an employee requests and receives approval for leave, NPSC employees are supposed to call the IVR phone system, indicating their pending approved absence. This helps the RMU know about the staffing levels in any of FEMA's NPSCs which, in turn, helps the RMU direct the flow of telephone calls to NPSC offices that have proper staffing levels to accept and process those phone calls. The use of FEMA's IVR phone system is not a leave requesting tool.

Although Complainant failed to follow procedures and did not request leave prior to her absence, Supervisor1 approved Complainant's use of sick leave on August 14-16, 2017. Complainant was out of the office from August 14-25, 2017, and used 44 hours of sick leave and 36 hours of annual leave to cover her absence, which Supervisor1 approved. Complainant returned to work from August 26-29, 2017. During this week, Complainant informed Supervisor1 that she had been under a doctor's care. Supervisor1 asked for (and Complainant agreed to provide) a doctor's note. Complainant requested, and management approved, 18 hours of annual leave for her last two workdays in August 2017.

Complainant was absent from work again from September 4-15, 2017. On September 15, 2017, Supervisor1 granted Complainant a combination of sick leave, annual leave, and leave without pay (LWOP) for her 80-hour absence during that period. Complainant continued to be absent from work, even after September 15, 2017. Supervisor1 granted Complainant annual leave, sick leave and LWOP for her absences from September 15 through September 26, 2017.

On September 26, 2017, Complainant's husband sent a doctor's note stating that Complainant "is being treated for a serious medical condition" to Supervisor1.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC AJ. Complainant timely requested a hearing. The AJ issued a summary judgment decision in favor of the Agency.

In the decision, the AJ first found that the Agency did not deny Complainant reasonable accommodation. Agency management did not know the reasons for Complainant's absences other than she was ill. While Complainant's husband testified that Complainant suffered from stomach pain, the record is devoid of evidence that Complainant informed Supervisor1 or any other manager of those stomach pains, and those stomach pains likely would not have amounted to a medical condition without more information from a medical professional. Supervisor1 only knew that Complainant was "under doctor's care" around September 2017. Supervisor1 was informed of Complainant's disabling condition on September 26, 2017, when Complainant submitted her doctor's note; however, this was after Supervisor1 had already contacted Labor and Employee Relations about taking further action on Complainant's performance.

Furthermore, once Complainant exhausted her available leave time, on or around September 7, 2017, Supervsior1 could have denied Complainant's continued requests for LWOP; however, Supervisor1 did not deny any of Complainant's leave requests, even when Complainant failed to follow the proper procedures in August 2017. To the extent that Complainant's requests to use her accrued sick and annual leave as well as LWOP due to illness were requests for reasonable accommodation, the Agency approved all these requests through September 26, 2017. The AJ determined that the record was devoid of any information that Complainant requested any reasonable accommodations during the period where Supervisor1 found her performance unacceptable. As such, once the Agency had prepared Complainant's termination memo, the Agency's issuance of the termination due to Complainant's continued poor performance was proper.

In addition, the AJ determined that the Agency articulated legitimate, nondiscriminatory reasons for its actions. Specifically, Complainant was terminated due to performance deficiencies in Performance Goal 1, which required her to maintain a Transaction Success Rate (TSR) of at least 87.5 percent, and in Core Competency 5, Technical Proficiency, which required her

to apply relevant knowledge and skills of her position to perform her duties in accordance with applicable guidelines. Complainant failed to show that these reasons were pretext for discrimination. As a result, the AJ found that Complainant was not subjected to discrimination as alleged.

The Agency subsequently issued a final order fully adopting the AJ's decision. The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant asserts that Supervisor1 and others gave contradictory testimony regarding the supervisory chain of command which is sufficient to establish pretext. Specifically, Complainant asserts that there is a genuine issue of a disputed fact by pure virtue of showing that a supervisory program specialist (Supervisory Program Specialist) was not Complainant's second line supervisor. In addition, Complainant asserts that Supervisor1 testified the Executive Officer (Executive Officer) had to approve the termination. However, Complainant asserts that Executive Officer stated many times in her testimony that she "was not aware" and "was not involved" with Complainant's termination. Accordingly, Complainant asserts that the Agency cannot confirm who approved the termination. Complainant also argues that she was terminated in retaliation for requesting a reasonable accommodation for cancer treatment.[2]

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).

[2] Reprisal was not an accepted basis of discrimination in the instant complaint.

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*).

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 fact-finder could not find in Complainant's favor.

Disparate Treatment – Termination

To prevail in a disparate treatment claim, 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 she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. 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. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Dep't of the Air Force, EEOC Appeal No. 2021004539 (Aug. 17, 2023).

For purposes of this decision, we assume that Complainant is an individual with a disability, within the meaning of the Rehabilitation Act. However, we agree with the AJ in concluding that Complainant failed to present sufficient evidence of a prima facie case of discrimination. The record is devoid of evidence of any similarly situated employees who were treated more favorably than Complainant. We also find the record devoid of evidence to establish a link between Complainant's disability and her termination. Complainant has presented no other evidence raising an inference of discrimination.

However, even assuming a prima facie case of discrimination can be shown, aside from Complainant's bare uncorroborated assertions, we find the record devoid of evidence to support a finding that the Agency's legitimate, non-discriminatory explanation for Complainant's termination (i.e. poor performance) was a pretext or otherwise motivated by discriminatory animus.

Denial of Reasonable Accommodation

An agency is required to make reasonable accommodation to the known physical and mental limitations of an individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o) and (p). In order to establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability as defined by 29 C.F.R. § 1630.2(g); (2) she is "qualified" as defined by 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 (Enforcement Guidance on Reasonable Accommodation), No. 915.002 (Oct. 17, 2002).

The term 'qualified,' with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m). The term "position" is not limited to the position held by the employee but may also include positions that the employee could have held as a result of reassignment. Therefore, in determining whether an employee is "qualified," an agency must look beyond the position which the employee presently encumbers. Enforcement Guidance on Reasonable Accommodation.

We agree with the AJ in concluding that the record is devoid of evidence that any management official was aware of the reasons Complainant needed leave. While Complainant's husband testified that Complainant suffered from stomach pain, the record is devoid of evidence that Complainant informed Supervisor1 or any other NPSC manager of those stomach pains, and those stomach pains likely would not have amounted to a medical condition without more information from a medical professional. The record shows that Supervisor1 only knew that Complainant was "under doctor's care" around September 2017. Supervisor1 was informed of Complainant's disabling condition on September 26, 2017, when Complainant submitted her doctor's note; however, this was after Supervisor1 had already contacted Labor and Employee Relations about taking further action on Complainant's performance.

Furthermore, the record shows that Supervisor1 granted all of Complainant's leave requests, even when Complainant failed to follow the proper procedures in August 2017. The record is devoid of information that Complainant requested any reasonable accommodations during the period where Supervisor1 found her performance unacceptable. With respect to timing, "an employer is not required to excuse past misconduct even if it is the result of the individual's disability. Therefore, when an employee does not give notice of the need for *accommodation until after the performance problem has occurred, reasonable accommodation* does not require that the employer: tolerate or excuse poor performance; withhold disciplinary action (including termination) warranted by the poor performance; raise a performance rating; or give an evaluation that does not reflect the employee's actual performance. Pet'r v. Dep't of the Army, EEOC Petition No. 0320120039 (Dec. 22, 2014) (emphasis in original) (citing EEOC Guidance on Applying Performance and Conduct Standards to Employees with Disabilities (dated Sept. 3, 2008)).

As such, once the Agency had prepared Complainant's termination letter the Agency's issuance of the termination due to Complainant's continued poor performance was proper.

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)t

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 18, 2025
Date