



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

[REDACTED]
Bonny R.,¹
Complainant,

v.

Martin J. O'Malley,
Commissioner,
Social Security Administration,
Agency.

Appeal No. 2023000421

Hearing No. 530-2021-00211X

Agency No. NY-20-0724-SSA

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 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.

ISSUE PRESENTED

The issue presented is whether the Agency correctly determined that Complainant was not subjected to discrimination based on race (African American) when she was removed from her position.

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 Claims Specialist (CS), GS-07, at the Agency's Egg Harbor Township Field Office in Egg Harbor Township, New Jersey.

On September 29, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of race (African American) when on June 17, 2020, she was terminated from her Claims Specialist position.

The investigation into the complaint revealed that Complainant was hired by the Agency as a Claims Specialist on June 23, 2019. See Report of Investigation (ROI) at 86-87, 89-91. As a condition of her employment, Complainant underwent a background check. ROI at 81, 90. For almost a year, Complainant competently performed her employment duties. Her probationary period was scheduled to expire on June 22, 2020. ROI at 84, 90, 135. Complainant's first-line supervisor was the Operations Supervisor, and her third-line supervisor was the District Manager. ROI at 60, 64, 76, 80.

The Operations Supervisor and the District Manager both claimed that Complainant's background check resulted in a response from the FBI indicating that Complainant was the subject of a criminal investigation. ROI at 77, 81, 95, 117, 127-128. On May 22, 2020, the Operations Supervisor issued a Notice to Remove to Complainant, proposing her removal from her CS position because she was part of an ongoing FBI investigation for criminal activity. ROI at 95-113. The Operations Supervisor noted that Complainant's position gave her access to sensitive information including Social Security numbers, addresses, and other personal information for virtually every U.S. citizen and even non-citizens. ROI at 95. The Operations Supervisor concluded that the appearance of Complainant's name in an ongoing FBI investigation cast doubt on whether Complainant could be trusted with this sensitive information and whether she could serve the public in a lawful and ethical manner. ROI at 95. The May 22, 2020, Notice gave Complainant seven days to file a written reply to the Notice and the option to review the materials relied upon in issuing the Notice. ROI at 95-96.

On May 26, 2020, Complainant requested the materials relied upon in proposing her removal. ROI at 115. On May 29, 2020, Complainant submitted a response to the Notice to Remove, denying that she had ever participated in criminal activity, that the FBI had ever contacted or questioned her, or that she was aware of any pending FBI investigation into her activity for any reason. ROI at 124-125.

Management sought guidance from the Regional Office Labor Management Employee Relations (LMER) and on June 1, 2020, the Operations Supervisor issued a "Corrected Notice to Remove." This Notice was identical to the May 22, 2020, Notice, except that it removed the statement that Complainant could request the materials relied upon. ROI at 77, 81, 83, 117-121. The Operations Supervisor explained in a cover letter that, as a probationary employee, Complainant was not entitled to review the materials relied upon. ROI at 119. The Corrected Notice again offered seven days to reply, but Complainant did not reply further. ROI at 117-118.

On June 16, 2020, the District Manager issued a Decision to Remove for the same reason as stated in the Corrected Notice to Remove. ROI at 127-131. The District Manager considered Complainant's response that she had not participated in any criminal activity and was not aware of being the subject of an FBI investigation but confirmed that he had received information that she was the subject of an ongoing FBI criminal investigation. ROI at 127. The District Manager stated that, due to the FBI investigation and the large amount of sensitive information to which the CS position gave Complainant access, he had "serious misgivings" about her ability to perform the duties of the position "effectively and honestly." ROI at 128. The Agency removed Complainant from the CS position effective June 17, 2020. ROI at 128, 612.

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 EEOC Administrative Judge (AJ). Complainant requested a hearing, but the AJ denied the hearing request on the grounds that Complainant's claims included procedural issues appealable to the Merit Systems Protection Board (MSPB). The AJ found that Complainant's claims constituted a mixed case and remanded the complaint to the Agency for a final decision. On June 21, 2022, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.302(d) and the AJ's order.

Complainant appealed the Agency's June 21, 2022, final decision to the MSPB. On August 19, 2022, the MSPB issued a decision denying jurisdiction and directing the Agency to issue a final decision on the merits of Complainant's claims. The Agency subsequently issued a final decision on September 30, 2022, 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 argues that a nexus between her race and the Agency's decision to terminate her employment is established by the fact that the Agency relied on an FBI investigation in which Complainant was not actually the subject of investigation. The Agency's "morphing" statements regarding her connection to the FBI investigation (starting with "[Complainant]... was allegedly being investigated for criminal activity" and changing to "party to an active FBI investigation") suggest that their reasoning is not legitimate. Complainant also asserts that her white male coworkers were not subjected to the same background investigation as she was. Further, Complainant argues that the Agency's failure to provide more substantial evidence supports an inference of discrimination. Lastly, Complainant claims that the Agency's failure to support their reasoning with evidence indicates that they presumed her guilt without any effort to discover the truth and without providing Complainant with a fair opportunity to address the allegations posed.

The Agency opposes Complainant's appeal and argues that Complainant failed to present evidence of any similarly situated employees that were the subject of ongoing FBI investigations. The Agency notes that its legitimate, nondiscriminatory reasoning for its actions is supported by statements from the Operations Supervisor and the District Manager, confirmation from the Defense Counterintelligence Security Agency (DCSA), a redacted FBI name check report, and Complainant's own statements admitting she may have been flagged as someone who knew people under FBI investigation. Finally, the Agency argues that Complainant's evidence of a subsequent background check revealing no incriminating information is not valid because there is no evidence that this subsequent background check included an FBI name check or any inquiry with the FBI.

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 race, 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 Dep't of Cmty. 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. Burdine, 450 U.S. at 253. 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. Hicks, 509 U.S. at 507.

Here, we find that Complainant established the first two elements of a prima facie case of race discrimination, as she is a member of a protected class (African American), and she suffered an adverse employment action when she was terminated from employment on June 17, 2020. However, we find that Complainant failed to establish the third element, as she presented no evidence of any similarly situated employees outside of her protected class who were treated more favorably than her. Indeed, we note that none of her comparators were named in active FBI criminal investigations. We ultimately find no persuasive evidence that any similarly situated employees were treated more favorably than Complainant.

Furthermore, we find that the Agency stated legitimate, nondiscriminatory reasons for its actions. The Operations Supervisor stated that Complainant's background check revealed she was "a subject of a current and ongoing FBI investigation for criminal activity." ROI at 77. The District Manager corroborated this fact, stating, "Complainant was involved with ongoing pending Federal Bureau of Investigation (FBI) investigation relating to criminal activity." ROI at 81.

The foregoing reasons constitute legitimate, nondiscriminatory reasons for the Agency's decision to terminate Complainant's employment. Complainant argues that the Agency's reasons are rebutted by the Agency's failure to provide evidence supporting their reasoning. She also argues that evidence of pretext can be inferred in the Agency's "morphing" statements regarding her connection to the FBI investigation. We ultimately find these arguments to be unpersuasive, as the Operations Supervisor, the District Manager, the DCSA correspondence, the FBI name check report, and Complainant's own statements all indicate that Complainant's name was associated with an ongoing FBI criminal investigation. We conclude that the Agency's reasoning is supported by the preponderance of the evidence in the record, and that Complainant's arguments for pretext rely on her own speculative conclusions.

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

January 15, 2025
Date