



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

████████████████████
Josefina P.,¹
Complainant,

v.

Kristi L. Noem,
Secretary,
Department of Homeland Security
(Headquarters),
Agency.

Appeal No. 2023000462

Hearing No. 570-2019-01123X

Agency No. HS-HQ-02647-2018

DECISION

Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403, from the Agency's September 28, 2022 final order concerning an 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 Equal Pay Act of 1963, as amended, 29 U.S.C. §206(d) et seq. For the following reasons, the Commission AFFIRMS the Agency's final action.

At the time of events giving rise to this complaint, Complainant worked as a GS-13, Intelligence Operations Specialist at the Agency's Intelligence and Analysis, Intelligence Training Academy (ITA) in Washington, DC.

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 November 23, 2018, Complainant filed a formal complaint alleging that:

1. Complainant was discriminated against and subjected to a hostile work environment based on sex (female) and race (Hispanic) when:
 - a. Since starting in her position in 2013, she has not received a Quality Step Increase (QSI) or other performance awards based on exceptional performance;
 - b. In January 2018, she applied for a GS-14 position, and the Agency cancelled the vacancy;²
 - c. On August 14, 2018, and other unspecified dates, her input, ideas, comments and recommendations were dismissed by her first line supervisor (S1), Director, Department of Homeland Security (DHS) ITA;
 - d. On August 14, 2018, the Agency denied her the opportunity to advance her skills and career when it refused her assignment request to facilitate an ITA seminar in New York City; and
 - e. On October 1, 2018, she learned that the Agency paid her less than male coworkers who hold the same position in violation of the Equal Pay Act and Title VII.
2. Complainant was discriminated against and subjected to a hostile work environment based on reprisal when:
 - a. On October 13, 2018, S1 rated her Fiscal Year (FY) 2018 Performance Review the lowest of her career; and

² On February 25, 2019, the Agency, pursuant to 29 C.F.R. §1614.107(a)(2), dismissed claim 1b, a discrete act, because Complainant did not contact an EEO Counselor until September 11, 2018. The subject claim was subsequently included for consideration in the analysis of the harassment claim.

- b. On an unspecified date, S1 denied her request to clarify, add, and discuss the rating before he finalized her FY 2018 Performance Review.

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant requested a hearing. The Agency submitted a motion for a decision without a hearing. Complainant filed her opposition. On September 15, 2022, the AJ issued a decision without a hearing.

Complainant began her position at the Agency on August 26, 2013. Regarding claim 1a, S1 stated that Complainant received performance awards for each rated year 2014 to 2018. Complainant acknowledged that she received a cash award of \$1,000 for FY 2014 and time off awards of 32, 32, 40, and 32 hours for FY 2015, FY 2016, FY 2017, and FY 2018, respectively. The record indicates that for FY 2014, 2015, 2016, and 2018, Complainant received a performance rating of "Exceeded Expectations" (highest to lowest ratings were Achieved Excellence, Exceeded Expectations, Achieved Expectations, and Unacceptable). S1 indicated that for FY 2017, there were four employees, two male and two female (including Complainant), who received "Achieved Excellence," eligible for a QSI. S1 stated that no employee received any QSI for FY 2017.

Regarding claim 1b, S1 indicated that the vacancy announcement for a GS-14, ITA Instructor position was canceled due to the Agency's leadership reorganization guidance to reduce the number of GS-14 and GS-15 non-supervisory positions since the Agency had too many senior employees. S1 stated that the ITA instructor position was later filled with a GS-13 employee.

Regarding claim 1c, S1 denied the incidents as alleged by Complainant. S1 stated that he never dismissed Complainant's ideas and recommendations.

Regarding claim 1d, S1 indicated that Complainant did not submit the assignment request as claimed.

Regarding claim 1e, S1 indicated that in 2013, Complainant was offered and accepted a GS-13, step 1, position. At that time, Complainant did not have any experience teaching intelligence courses for the DHS ITA. S1 indicated that in 2018, two male employees, identified by Complainant, were initially

offered a GS-13, step 1, position but they declined. They requested higher steps based on their experience teaching intelligence courses for the DHS ITA as contractor instructors. Based on their exceptional instructor skills and experience, one was hired as a GS-13, step 9, and the other as a GS-13, step 3.

Regarding claim 2a, S1 stated that Complainant received a performance rating of "Exceeds Expectations" (rating points of 3.65 out of 5, highest) for FY 2018 because she did not fully complete two of the assigned goals outlined in her performance plan and she was significantly below the goal in four of the five training courses she was assigned.

Regarding claim 2b, S1 stated that Complainant did not request to clarify, add, and discuss her assessment before it was finalized. S1 indicated that Complainant's FY 2018 Performance Review was based on her self-assessment submitted on October 1, 2018, and his own observations of her performance. S1 noted that in November 2018, he departed the ITA after accepting a new position.

The AJ found that based on the foregoing, Complainant's receiving less pay than the identified two male employees was not based on sex. And the AJ stated that Complainant failed to present sufficient evidence that the Agency's reasons, set forth in detail above, were pretextual. The AJ found that Complainant's claims, considering all the events and taken as true, did not create a chilling effect or rise to the level of severity or pervasiveness necessary to state a claim of harassment. The AJ also found that the Agency articulated legitimate, nondiscriminatory reasons for its actions and Complainant failed to rebut the articulated reasons.

The Agency issued its final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination or harassment as alleged. The instant appeal followed. Complainant resubmits documentation she previously submitted to the AJ and which were fully considered by the AJ.

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. (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*).

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.

The AJ found that the Agency articulated legitimate, nondiscriminatory reasons for its actions. Specifically, the Agency stated that Complainant received performance awards of which she acknowledged; the GS-14 vacancy was cancelled due to the Agency's reorganization guidance; two identified male employees were hired at higher steps (higher pay) than she was because they already had experience teaching intelligence courses for the DHS ITA; and her FY 2018 performance rating of "Exceeds Expectations" (rating points of 3.65) was due to her not fully completing two of the assigned goals outlined in her performance plan. 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 or harassed by the Agency as alleged.

Accordingly, we AFFIRM the Agency's final order 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.**

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION-EQUAL PAY ACT (Y0408)

You are authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. § 216(b)) to file a civil action in a court of competent jurisdiction **within two years** or, if the violation is willful, **three years** of the date of the alleged violation of the **Equal Pay Act** regardless of whether you have pursued any administrative complaint processing. The filing of the 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