



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

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Josefina L,<sup>1</sup>  
Complainant,

v.

Lloyd J. Austin III,  
Secretary,  
Department of Defense  
(Defense Logistics Agency),  
Agency.

Appeal No. 2023000650

Hearing No. 532-2019-00116X

Agency No. DLAC-18-0248

DECISION

On November 10, 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 15, 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 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

The issue presented is whether the EEOC Administrative Judge correctly determined that the Agency did not subject Complainant to discrimination based on her race and disability as alleged.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Contract Specialist, GS-1102-11, at the Agency's Land & Maritime Division in Columbus, Ohio.

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<sup>1</sup> 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 March 22, 2015, Complainant (African American, Visual Impairment-Glaucoma) was assigned to her GS-11 position with growth potential to GS-12, at the Agency's Strategic Acquisition Programs Directorate (SAPD) in the Major Projects Branch. Complainant provided medical documentation from her health care provider indicating her need for surgery and reasonable accommodation between September 22, 2015, and February 12, 2016.

The record reflects that Complainant requested and received reasonable accommodation in the form of a larger monitor, additional lighting and a magnifier due to her medical condition and job performance needs after her surgeries in September 2015 and March 2016. On February 23, 2017, Complainant was diagnosed with Glaucoma, Dry Eyes, and Presbyopia (Farsightedness). Report of Investigation (ROI) at 10, 137, and 255. The record does not reflect that she requested any additional reasonable accommodation after the diagnoses.

Since March 2017, Complainant's first-line supervisor was a Supervisory Contract Officer (Supervisor 1 [Caucasian]). ROI at 11 and 255. Complainant's second-line supervisor (Supervisor 2) was the Division Chief. The Deputy Director, Strategic Acquisition Programs was Complainant's third-level supervisor (Supervisor 3 [African American]). ROI at 66-7, 272, 282, and 284.

On February 22, 2017, Complainant met with a named GS-13-1102 Contract Specialist (Contract Specialist 1 [Caucasian]) to discuss Complainant's work. ROI at 268 and 325-26. On or about August 19, 2018, Complainant was not promoted to the GS-12 level; and she was reassigned from her GS-11 Contracts Specialist developmental position with full performance at the GS-12 level to a GS-11 Contracts Specialist non-developmental position. ROI at 128.

According to the Agency, Complainant struggled to meet the qualitative requirements of her duties. They explained that Supervisor 1 provided detailed feedback on Complainant's work and counseled her on her performance shortcomings in their Mid-Year discussion. Supervisor 1 also issued to Complainant a Letter of Warning. The Agency stated that Contract Specialist 1 who was assigned to Complainant also provided numerous detailed critiques of her work. ROI at 83-6, 106-07, and 290-91.

A named individual who had served as Complainant's temporary supervisor at some point also independently assessed that Complainant was not meeting the performance requirement expected of a GS-12 and recommended that she not be promoted to that grade level.

According to Complainant, she was also denied promotions to the GS-12 level in March 2016 and March 2018 despite being evaluated at the fullest successful level in 2017 and 2018 after she met the standards (which, Complainant asserted, is supported by agency documentation).

Complainant stated that she was not properly trained between March 2015 through August 2018. ROI at 254 and 267-68. Complainant alleged that Supervisor 1 would not assist her when requested with respect to various work tasks. However, asserted Complainant, she observed Supervisor 1 assisting and training her Caucasian peers. ROI at 260.

Complainant stated that she inquired as to why she was not promoted and Supervisor 1 initially indicated that Complainant would be promoted six months into her tenure. After six months elapsed, Complainant stated, Supervisor 1 indicated that Supervisor 3's policy was that no one would be promoted before one year of tenure. However, added Complainant, Supervisor 1 promoted a Caucasian member of her team with less than one year of tenure. ROI at 262.

Complainant also took substantial issue with the February 2018, letter of warning for poor performance, stating that Supervisor 1's primary criticism were Complainant's alleged errors resulting in work having to be redone, Complainant not working independently and performing job duties including conducting research on her own.

Complainant identified two comparative Caucasian employees (Coworkers 1 and 2) who she alleged were treated more favorably than her. ROI at 356. She also identified three Caucasian employees (Coworkers 3-5) who she alleged were assigned trainers after she left. ROI at 359.

Complainant initiated EEO contact on August 23, 2018. On October 11, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American) and disability (physical) when:

1. On May 21, 2018, Complainant received a Fully Successful Performance rating;
2. On May 21, 2018, Complainant was denied a Performance Award;
3. On August 19, 2018, Complainant was reassigned from a Contract Specialist position which had growth potential to a Contract Specialist position with no growth potential; and
4. On August 20, 2018, Complainant was denied a promotion to the GS-12 grade level.

The AJ assigned to the case noted that a former AJ (since retired) reframed and limited the issues to those identified above as evident in her June 4, 2021, Status Conference Memorandum and Order (attached as Exhibit 1 to Agency's motion and uploaded to the EEOC's portal). The AJ confirmed with the parties' counsel that the above were the claims to be adjudicated. All other claims were waived. Further, noted the AJ, by way of her September 9, 2021, response in opposition, Complainant pursued her claims only on the bases of race (African American) and disability (vision impairment), thereby waiving the bases of color, sex and retaliation (Complainant's original complaint also included age which is not included in the stated bases). Complainant did not contest the reframing of her claims and bases or the AJ's noted comments regarding them. Nor did she reassert failure to accommodate or hostile work environment (not mentioned in the AJ's notes but included in the original complaint) as issues on appeal. Therefore, these presumed waived issues and bases will not be addressed in this decision.

The Agency conducted an investigation into the complaint. 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 Equal Employment Opportunity Commission Administrative Judge (AJ).

Complainant timely requested a hearing. The parties were given an opportunity to engage in and complete discovery. Thereafter, on August 18, 2021, pursuant to 29 C.F.R. § 1614.109(g)(1), the Agency timely moved for summary judgment (Agency's motion). On September 9, 2021, Complainant filed a Response in Opposition (Complainant's response); and, on September 14, 2021, the Agency filed its Reply.

Having considered all material documentary evidence in the record, including the ROI and the parties' submissions, the AJ assigned to the case determined that there were no genuine issues of material fact in dispute regarding Complainant's claims of discrimination on the bases of race and/or disability. The AJ found that Complainant had the opportunity to engage in discovery, that the record had been adequately developed, and that no finding of credibility needed to be made to issue a decision in this matter. Viewing all the evidence in the light most favorable to Complainant, the AJ concluded that Complainant failed to establish, by a preponderance of the evidence, that she was discriminated against because of her race or disability. On August 19, 2022, the AJ issued a decision without a hearing in favor of the Agency pursuant to 29 CFR Section 1614. 109 (g).

The AJ dismissed Claims 1 and 2 as untimely, citing to Commission Regulation at 29 C.F.R. § 1614.105(a)(1) which requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action. Here, observed the AJ, Complainant initiated EEO Counselor contact on August 23, 2018. The incidents alleged in Claims 1 and 2 occurred on May 21, 2018, 95 days prior, which, noted the AJ, is outside the 45-day regulatory period for EEO Counselor contact.

Regarding Claims 3 and 4, the AJ determined that the Agency had a clear legitimate, non-discriminatory reasons for its actions and Complainant presented no pretextual evidence to the contrary. The AJ noted record evidence reflecting that Complainant was not promoted and was reassigned due to deficiencies in her performance and quality of work, and Complainant's failure to progress. ROI at 294-96 and 298.

Citing to Commission precedent, the AJ asserted that agencies generally have broad discretion to carry out personnel decisions and exercise business judgment. The question, noted the AJ, is not whether the Agency made the best, or even a sound, business decision; it is whether the real reason is discrimination. The AJ added that pretext inquiry is not concerned with bad judgment, impeccability, dislike, or a mistake. Rather, observed the AJ, the focus of pretext inquiry is whether an agency's actions were motivated by discriminatory animus. Further, the AJ stated, at all times the ultimate burden of persuasion remains with Complainant to demonstrate by a preponderance of the evidence that the Agency was motivated by prohibited discrimination. The AJ found that Complainant failed in this regard.

According to the AJ, Complainant failed to point to any similarly situated persons treated differently, nor to any other evidence suggesting a connection between her protected characteristics and the events outlined in her complaint.

Further, observed the AJ, Complainant was unable to establish that the Agency's actions were pretextual and motivated by a discriminatory animus. As such, the AJ asserted that the Commission could not find that the Agency acted on discriminatory bases as to the aforementioned claims.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. This appeal followed.

### CONTENTIONS ON APPEAL

On appeal, Complainant, through counsel, reiterates her allegations and contests the AJ's decision, asserting that the AJ did not consider several relevant facts Complainant argued in her Memorandum in Opposition to the Agency's Motion for Summary Judgment. According to Complainant, the AJ only considered five undisputed material facts in her opinion.

Complainant alleges that the AJ did not address relevant facts that included the previous performance awards she had received; the promotions she was denied in 2016 and 2018; her alleged improper training, and her objection to the Letter of Warning she had been issued. Complainant also asserts that the AJ erroneously held that Complainant failed to point to any similarly situated individuals treated differently, reiterating that she had identified Coworkers 1-5.

According to Complainant, the AJ also erred by not finding that Complainant demonstrated that the Agency's actions were pretextual and motivated by a discriminatory animus. Complainant argues that she had substantial proof of pretext, asserting that when considering her lack of training, the disparate treatment of the Caucasian individuals she named as well as her own previous work performance, at a minimum, raised genuine issues of material fact regarding the Agency's explanation for Complainant's failure to receive the deserved promotion. As a result, states Complainant, the AJ's decision should be reversed.

Complainant also alleges that the Agency did not take final action on the AJ's August 19, 2022, decision, stating that the Agency did not issue a final order notifying Complainant whether the Agency fully implements the decision within 40 calendar days of the AJ's decision. As a result, Complainant states she files the instant appeal.

The Agency did not submit an appeal statement.

### ANALYSIS AND FINDINGS

#### *Preliminary Matters*

At the onset, we affirm the AJ's dismissal of Claims 1 and 2 as untimely raised in accordance with the Commission Regulation at 29 C.F.R. § 1614.105(a)(1) which requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of

a personnel action, within forty-five (45) days of the effective date of the action. As the AJ rightly observed, the record reflects that Complainant initiated EEO Counselor contact on August 23, 2018. The incidents alleged in Claims 1 and 2 occurred some 95 days prior, on May 21, 2018. This exceeds the 45-day regulatory period for EEO Counselor contact. We note that in her appeal statement, Complainant alludes to matters pertaining to the dismissed claims, including those pertaining to performance awards. However, because Claims 1 and 2 were untimely filed, any allusions to those claims will only be addressed in this decision to the extent that they are connected to Complainant's remaining undismissed claims.

Complainant also alleged on appeal that the Agency did not issue a final order within 40 days of the AJ's August 19, 2022 decision. However, the record reflects that the Agency issued a final action on September 15, 2022, some 34 days after the AJ's August 2022 decision. This was less than the 40 days required in 29 C.F.R. 1614.110. Even if Complainant is correct and the Agency did not timely issue the final action, Complainant would still be able to file her appeal in accordance with 29 C.F.R. 1614.109(i) as the AJ's decision would have become the Agency's final action. Therefore, Complainant's appeal allegation on this matter is inaccurate and will not be further addressed herein; and she would have suffered no harm if it was.

#### *The AJ's Issuance of Summary Judgment*

##### *Standard of Review*

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 nonmoving 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).

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.

#### *Disparate Treatment Based on Race and Disability (Claims 3 and 4)*

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to

prevail, he or she 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; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, 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. St. Mary's Honor Ctr. 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. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

After a review of the record, assuming arguendo that Complainant established a prima facie case of discrimination, we find that the Agency articulated legitimate, nondiscriminatory reasons for its action. The Agency explained that Complainant was reassigned on August 19, 2018, and she was not promoted to the GS-12 grade level on August 20, 2018, because she performed poorly at the developmental GS-11 grade level. The record contains statements provided by Supervisor 1 who asserted that Complainant was hired under a position that has non-competitive growth potential to GS-12. ROI at 294.

According to Supervisor 1, although Complainant met the time-in-grade requirement to receive the promotion, she was not promoted to the GS-12 full performance level because she had not produced the quality of work to merit promotion due to her quantity and magnitude of work product errors. ROI at 294-99. See ROI at 101-05 for Contract Specialist, GS-1102-12, Position Description (PD).

We note Complainant's appeal assertions that the AJ's decision was in error; and that the AJ failed to address relevant facts that included the previous performance awards she had received; the promotions she was denied in 2016 and 2018; her alleged improper training, and her objection to the Letter of Warning she had been issued. In that regard, we have held that each year's performance rating is based solely upon the employee's performance during the preceding fiscal year and that the mere fact that a complainant received higher ratings in the recent past is insufficient, without more, to demonstrate that subsequent lower performance ratings were issued for discriminatory reasons. See Colleen M. v. Dep't of Justice, EEOC Appeal No. 0120140945 (Apr. 22, 2016). See also Jones v. Dep't of State, EEOC Appeal No. 01995660 (Jan. 24, 2002) (supervisor "not forever obligated to continue giving complainant such ratings simply because she had gotten them in the past.").

We also note that Complainant identified Coworkers 1 and 2 as two comparative Caucasian employees who she alleged were treated more favorably than her. ROI at 356. She also identified Coworkers 3-5, three Caucasian employees who she alleged were assigned trainers after she left, arguing that they received training while she did not. ROI at 359.

However, Supervisor 1, affirmed by Supervisor 3, stated that Complainant received on the job training (OJT) comparable to all associates who are hired under the same PD. According to her, she met with Complainant on a weekly basis to go over each project to provide guidance and direction. Complainant asserted that sitting at Supervisor 1's desk watching her manipulate her work is not training, nor is it conducive to how Complainant learns. She stated that she made numerous requests to receive in-section training, and she should have been appointed a trainer, as new employees now receive. ROI at 358.

Yet, Supervisor 1 asserted that the general standard is that associates under PD B0931 (Complainant's PD) reach the GS-12 performance level within a year. She asserted that Complainant was given three times the normal training period to improve performance and to qualify to the GS-12 performance level. ROI at 304-06 and 321-22. Complainant did not dispute these assertions.

The record is also devoid of any evidence that any of the coworkers Complainant identified were hired under the same developmental program as Complainant and had the same performance issues as she did. Complainant also failed to address her performance deficiencies even after Supervisor 1 issued her a Letter of Warning about her shortcomings. Based on the foregoing, we find that Complainant failed to show that there were any similarly situated employees not in her protected groups who were treated differently under similar circumstances.

Beyond conclusory and speculative assertions, Complainant has presented no corroborating evidence to refute or undercut the explanations provided by Supervisor 1 or which would cause us to doubt her veracity as a witness. Ultimately, we find that Complainant failed to establish the existence of a factual dispute sufficient to give rise to a genuine issue of material fact. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in her favor.

### CONCLUSION

Accordingly, we AFFIRM the Agency's final order adopting the AJ's 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

January 29, 2024  
Date