



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

[REDACTED]
Dana D.,¹
Complainant,

v.

Kristi L. Noem,
Secretary,
Department of Homeland Security
(Cybersecurity and Infrastructure Security Agency),
Agency.

Appeal No. 2023000708

Hearing No. 570-2019-01131X

Agency No. HS-HQ-01512-2018

DECISION

On November 15, 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 October 20, 2022 final order concerning her equal employment opportunity (EEO) complaint alleging 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.

At the time of events giving rise to this complaint, Complainant worked as a Special Advisor to the Chief of Staff, GS-2210-14, Office of Cybersecurity and Communications, in Arlington, Virginia.

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 May 22, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment based on disability (unspecified) when:

1. In and around January/February 2017, the Deputy Chief of Staff, in an open environment, asked Complainant about her health, and although Complainant voluntarily provided the information, she felt intimidated to provide it;
2. On or about June 13, 2017, Complainant became aware she was removed from the Workforce Operations Office distribution lists;
3. One or about June 27, 2017, Complainant was ineligible for detail opportunities due to not having a signed individual development plan (IDP);
4. Following the Agency's notification that Complainant had been reassigned to the Workforce Operations Office, the Agency did not follow formal protocol to officially transition her out of the Office of Chief of Staff (OCOS) to Workforce Operations, as directed by the National Protection & Programs Directorate (NPPD) policy;
5. On February 19, 2018, Complainant was paid less for the GS-14 position she held in OCOS compared to a former contractor, that the Agency directly hired to perform the same duties;
6. About November 2016, the Acting Director Workforce Operations, entered Complainant's office and yelled at her for emailing a "thank you" and point of contact update for the program she was vacating;
7. About November 2016, Complainant was not allowed to email outside the immediate organization and was never provided a reason why or offered any constructive criticism;
8. About January 2018, Complainant's application for the NPPD Wellness Program was denied;
9. On March 13, 2018, Complainant became aware that Workforce Operations' assignments that she supported were assigned to other personnel outside of the Workforce Operations Office;
10. On March 14, 2018, Complainant became aware her Fiscal Year (FY) 2017 Performance Award was significantly less than the previous years;
11. On March 15, 2018, Complainant's Cybersecurity and Communications Career Path Planning meeting was cancelled and not rescheduled;

12. On March 15, 2018, Complainant was instructed not to send emails outside the organization or schedule meetings without prior approval; and
13. On March 23, 2018, Complainant's attendance and participation on an RSA Recruitment discussion with NPPD Talent Management was cancelled.²

The pertinent record shows that on January 3, 2017, Complainant was diagnosed with Cushing's Disease Syndrome. Report of Investigation (ROI) at 387, 404. She had surgery to remove the tumor associated with the Cushing's Disease Syndrome. Complainant told a manager, who asked her how she was doing, that she had a brain tumor and needed surgery to remove the tumor. ROI at 444-447, 1602-1604. She did not formerly tell management she had a disability until she applied for the Voluntary Leave Transfer Program around May 9, 2017.

Around late 2017 to early 2018, as part of a realignment, Complainant's billet was moved to a different unit, all within the CS&C. Around June 2017, Complainant's name was removed from the Office of Chief of Staff's Office of Cybersecurity and Communications (CS&C) office email distribution lists while she was assigned to duties outside of the office. Other employees had been removed from office distribution lists when they no longer had daily duties within the office.

Performance awards are tied to performance ratings. ROI at 1487-1488, 1510. The amount of money available for performance awards varies from year to year. On February 19, 2018, Complainant learned she was paid less for the GS-14 position she held in OCOS, as compared to a former contractor, that the Agency directly hired to perform the same duties. The record shows that Position Descriptions are not identical. The comparator did not report to the same supervisor. By July 2018, Complainant was a GS-14, Step 5, with a salary of \$142,856, part of which was cybersecurity retention pay. ROI at 1911. The record also showed that a Career Path Planning meeting scheduled for March 23, 2018, was cancelled because Complainant failed to coordinate the meeting with her leadership.

² The Agency dismissed claims 1 to 8 as untimely raised with an EEO Counselor. These claims will be considered as background evidence in support of Complainant's hostile work environment claim.

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 timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's motion and issued a summary judgment decision without a hearing.

In the decision, the AJ determined that Complainant's allegations, even when taken as true, were insufficiently severe or pervasive to establish a hostile work environment. Further, the AJ found that the record was devoid of evidence that any of the alleged incidents resulted from a discriminatory animus. As a result, the AJ found that Complainant was not subjected to discrimination or a hostile work environment as alleged.

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

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. (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. 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 factfinder could not find in Complainant's favor.

Complainant failed to demonstrate that the Agency officials in this matter harbored discriminatory animus or that the legitimate, non-discriminatory reasons provided by the officials were pretext for unlawful discrimination. Furthermore, the alleged conduct was not sufficiently severe or pervasive to establish a legally hostile work environment. The evidentiary record reflects that the alleged incidents were more likely the result of routine supervision, managerial discipline, and general workplace disputes and tribulations. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant's favor. As a result, the Commission finds that Complainant was not subjected to discrimination or a hostile work environment as alleged.

CONCLUSION

Upon careful review of the AJ's decision and the evidence of record, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged. Accordingly, we AFFIRM the Agency's final order fully 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).

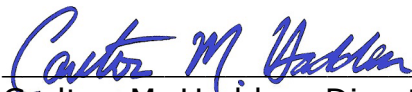
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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:



Carlton M. Hadden, Director
Office of Federal Operations

March 4, 2025

Date