



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

[REDACTED]
Cecille W.,¹
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Appeal No. 2023000992

Agency No. IRS-22-0116-F

DECISION

On December 1, 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 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, the Commission AFFIRMS the Agency's final decision.

ISSUE PRESENTED

The issue presented on appeal is whether Complainant established by the preponderance of the evidence that she was subjected to discrimination based on national origin, sex, and/or reprisal.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked for the Agency as an IR-FM-0501-5 Supervisory Individual Tax Advisory Specialist (Field Assistance Group Manager) in San Jose, California. Report of Investigation (ROI) at 76, 104-10. Complainant's first-line supervisor was the Territory Manager, who was based in Fresno, California. ROI at 76, 86, 104.

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.

Complainant is a Hispanic woman, and the Territory Manager is an African American woman. ROI at 76-77, 86-87.

Complainant stated that she engaged in protected EEO activity on September 15, 2021, when she filed a complaint of harassment/bullying by the Territory Manager with the Agency. ROI at 77. The record contains a Contact Intake Form reflecting that Complainant reported on September 13, 2021, that the Territory Manager was harassing her and other employees and requested to speak to someone regarding the Agency's anti-harassment program. ROI at 100-01. The intake staff noted that Complainant indicated that the harassment was not connected to a protected basis because the Territory Manager was "harassing everyone." ROI at 101. On September 16, 2021, the matter was referred to the Agency's anti-harassment program. ROI at 101.

From October 12-22, 2021, the Agency conducted an Anti-Harassment Manager Inquiry. ROI at 135-41. Complainant raised six allegations, and the Inquiry Official found four allegations to be corroborated, one allegation to be partially corroborated, and one allegation not to be corroborated. ROI at 135-41. According to the Inquiry Official, multiple witnesses reported that the Territory Manager had a habit of interrupting and talking over people, made unprofessional remarks, and was harsh and demanding. ROI at 136-39. The Inquiry Official also determined that Complainant and the Territory Manager engaged in a heated exchange over the phone and that the Territory Manager attempted to track Complainant down using multiple communications channels more than once. ROI at 137-39. Because the Territory Manager lost her temper or "had a moment" with her staff on three occasions, the Inquiry Official recommended that the Territory Manager take anger management training to learn de-escalation techniques and communication courses to help with verbal and written communication. ROI at 139-40. The Inquiry Official also recommended that Complainant take communication courses because Complainant's emails demonstrated that her communications were also terse and harsh. ROI at 140. The Deciding Official closed the matter without adverse action, recommending that the Territory Manager take two anger management and five communication courses and that Complainant take one communication course. ROI at 140-41.

Complainant initiated EEO counseling on November 22, 2021. On December 31, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Hispanic),² sex (female), and reprisal for prior protected activity (reporting harassment by the Territory Manager in September 2021) when, on November 2, 2021, her annual appraisal was lowered from Exceeds Fully Successful to Fully Successful without any written documentation or warning beyond one issue raised in her mid-year evaluation.

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). When Complainant did not request a

² Although Complainant designated her race as "Hispanic," the Commission recognizes this term as an indication of national origin rather than race. Accordingly, we will address her claim as involving an allegation of national origin discrimination.

hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The instant appeal followed.

ANALYSIS AND FINDINGS

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”).

Complainant alleged that she was subjected to discrimination based on national origin, sex, and reprisal for prior protected EEO activity when, on November 3, 2021, the Territory Manager issued her an annual performance appraisal with an overall Fully Successful rating. ROI at 77. The Agency assumed for the purposes of its final decision that Complainant’s anti-harassment program complaint constituted prior protected EEO activity, and we will adopt that assumption for the purposes of our analysis.

For fiscal year (FY) 2020, the Territory Manager rated Complainant as “Exceeds” for the responsibilities of Leadership and Human Capital Management, Customer Service and Collaboration, and Program Management, as “Exceeds” for the commitments of Efficiency and Process Improvement, and as “Meets” for the commitment of Quality, resulting in an overall rating of “Exceeded.” ROI at 124-31.

On April 16, 2021, the Territory Manager emailed Complainant, summarizing their mid-year discussion of her performance. ROI at 84. For Leadership and Human Capital Management, the Territory Manager stated that Complainant should remember the “‘less is more’ approach in communication (verbal/written).” ROI at 84. The Territory Manager suggested under Customer Service and Collaboration that Complainant be specific in detailing actions and challenges. ROI at 84. For the first commitment, FY 2021 Initiative, the Territory Manager stated “additional corrective action is needed.” ROI at 84. According to the Territory Manager, Complainant needed to implement additional improvements for the second commitment, Process Improvement, and should continue to keep the third commitment, Quality, an ongoing topic at meetings and address all reviews timely. ROI at 84.

On April 16, 2021, the Territory Manager added more detailed feedback and interim ratings for the three responsibilities and three commitments to Complainant's Midyear Progress Review, which Complainant acknowledged with her signature on April 19, 2021. ROI at 114-15. For Leadership and Human Capital Management, the Territory Manager rated Complainant "Meets," stating that her emails to staff and others did "not always demonstrate integrity and sound judgment" and that the Territory Manager and Complainant had multiple conversations during the FY about what should not have been put into writing, with the direction that "Less is More." ROI at 114. The Territory Manager rated Complainant "Exceeds" for Customer Service and Collaboration and Program Management and as "Meets" for all three commitments. ROI at 114-15.

On October 22, 2021, the Territory Manager submitted Complainant's FY 2021 performance appraisal to the reviewing official. ROI at 119. The Territory Manager rated Complainant as "Exceeds" for the responsibility of Customer Service and Collaboration and the commitments of FY 2021 Initiative and Process Improvement and as "Meets" for the responsibilities of Leadership and Human Capital and Program Management and the commitment of Quality, resulting in an overall rating of "Met." ROI at 118-19. The Reviewing Official signed off on the Territory Manager's evaluation of Complainant's performance on October 28, 2021. ROI at 119.

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). She must generally 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. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep't of Veterans Affs., EEOC Request No. 05950842 (Nov. 13, 1997). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, supra; Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995).

The Agency's legitimate, nondiscriminatory explanation for rating Complainant as Meets for Leadership and Human Capital, Program Management, and Quality, resulting in an overall rating of "Met" was that she had issues with written and verbal communication and for Complainant's group not meeting the 94 percent quality goal. ROI at 90-91, 118-19.

According to Complainant, she should have received the same rating because her work performance did not change from FY 2020 to FY 2021 and her workload increased because of the Covid-19 pandemic. ROI at 81. As evidence of pretext, Complainant asserted that, other than one issue raised in her mid-year evaluation, she was not warned that her rating would be lower than the rating she received the prior year or informed what she would need to do to improve her performance. ROI at 77-82.

However, the record reflects that the FY 2021 Mid-Year Progress Review reflected lower ratings in multiple areas, and both the Mid-Year Progress Review and the April 16 email highlighted areas where Complainant needed to improve. Moreover, while the Agency's performance management policy states that supervisors must counsel, advise, and assist employees whose performance does not meet expectations and initiate corrective actions where necessary, there is no requirement to notify employees whose performance meets expectations that they are not on track to receive the same rating as the prior year. ROI at 148-50, 163, 172-75.

Complainant stated that she believed her national origin and sex were factors in her appraisal because the Territory Manager created a toxic work environment and, when Complainant did not agree with her, was mean and nasty towards Complainant and yelled at her. ROI at 81-82. She alleged that her prior protected EEO activity was a factor because she tried to resolve the mistreatment by the Territory Manager at a low level. ROI at 82. There is evidence in the record suggesting that the Territory Manager had issues with communication and controlling her temper, but it appears that this was a general issue, as Complainant reported to the anti-harassment program that the Territory Manager was harassing "everyone," and multiple witnesses told the Inquiry Official that they were harassed by the Territory Manager. Complainant identified two former coworkers who were similarly harassed by the Territory Manager, including a Latina woman who had not engaged in protected activity and an American³ man who had not engaged in protected activity. ROI at 82-83. The preponderance of the evidence in the record does not show that the Territory Manager singled Complainant out or singled out members of Complainant's protected classes. We note that the Territory Manager forwarded Complainant's FY 2021 evaluation to the reviewing official the same day the Anti-Harassment Management Inquiry was completed, October 22, 2021. ROI at 119, 135. However, there is no evidence in the record showing that the Territory Manager was made aware of the conclusion of the inquiry on that date, nor has Complainant provided any evidence of retaliatory animus by the Territory Manager towards Complainant for contacting the anti-harassment program.

Complainant also alleged that the Territory Manager cited irrelevant and outdated examples to support the Fully Successful rating, stating that the Territory Manager provided an example where Complainant reached out to an Analyst to ask a question when she should have contacted the Territory Manager, which Complainant stated did not happen during FY 2021. ROI at 78-82. However, the example referenced by Complainant does not appear in the Territory Manager's narrative for her FY 2021 annual appraisal. ROI at 118. Further, the Anti-Harassment Inquiry Official found that Complainant engaged in a heated phone exchange with the Territory Manager and that her written communications were tense and harsh, suggesting that Complainant did have issues with communication. ROI at 137-40. Although Complainant contends that the Territory Manager evaluated her on irrelevant criteria, regarding personnel actions by an agency, we have consistently recognized that an agency has broad discretion to set policies and carry out personnel decisions, and should not be second-guessed, as here, by the reviewing authority absent evidence of unlawful motivation. See Burdine, 450 U.S. at 259; Vanek v. Dep't of the

³ Complainant identified the former coworker's race/national origin as "American." ROI at 82.

Treasury, EEOC Request No. 05940906 (Jan. 16, 1997). Moreover, mere assertions or suppositions by Complainant are not enough to establish pretext. Richardson v. Dep't of Agriculture, EEOC Petition No. 03A40016, (Dec. 11, 2003). Neither is it enough for Complainant to simply disagree with the Agency's actions. Harris v. Dep't of the Army, EEOC Appeal No. 01940486 (Sept. 6, 1994), request to reconsider denied, EEOC Request No. 05950046 (Mar. 21, 1996). We have consistently stated that pretext analysis is not concerned with whether the Agency's action was unfair or erroneous but whether it was motivated by discriminatory animus. Andrews v U.S. Postal Serv., EEOC Petition No. 03980017 (May 28, 1988). Upon review, we conclude that Complainant has not established by preponderant evidence in the record that the Agency's legitimate, nondiscriminatory reason was a pretext for discrimination based on national origin, sex, and/or reprisal.

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 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.**

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 23, 2024
Date