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

[redacted]
Lilla B.,[1]
Complainant,

v.

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

Appeal No. 2023001405

Hearing No. 430-2021-00084X

Agency No. HS-TSA-01039-2020

DECISION

On January 3, 2023, 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 December 5, 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.

At the time of events giving rise to this complaint, Complainant worked for the Agency as an SV-1802-E Transportation Security Officer (TSO) at Raleigh-Durham International Airport (RDU) in Raleigh, North Carolina.

[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 September 5, 2019, a Supervisory TSO (STSO) issued Complainant a Letter of Reprimand (LOR) for failure to follow instructions and inattention to duty. Complainant grieved the LOR. On March 16, 2020, Complainant's grievance was denied.

In September 2019, Complainant was diagnosed with posterior tibial tendonitis. On October 8, 2019, Complainant requested leave under the Family and Medical Leave Act (FMLA) based on tendonitis and trouble walking, and her request was approved. On October 30, 2019, Complainant submitted an updated FMLA request with her doctor's recommendation that she be excused from work from October 24, 2019, through December 6, 2019, in order to manage ongoing pain and difficulty walking due to tendonitis. Complainant's request was approved.

On November 24, 2019, Complainant was scheduled on a flight for personal travel out of Piedmont Triad International Airport (GSO) in Greensboro, North Carolina. Complainant was running late, and the airline told her she could not check in her bags. Complainant approached a TSO and asked whether someone from the Agency could help her with her bags. The TSO said that they could not help her, and Complainant said something to the effect of "well, they do it at Raleigh (RDU)." A Lead TSO (LTSO) overheard the conversation, told Complainant her request was against the rules, and reported the incident to a STSO. Complainant rebooked a flight on another airline and checked her bags. The TSO, the LTSO, and the STSO at GSO stated that Complainant had asked for an Agency employee to take her bags through security because she had oversized liquids and stated that, at RDU, a STSO would take such bags through security and walk them to the gate as a courtesy for airport employees who were running late for their flight. The STSO reported the incident to her manager, who reported it to RDU.

On December 9, 2019, Complainant informed the Agency that her disability had been extended and that she was calling out sick from December 9, 2019, through January 9, 2020. On December 20, 2019, the Transportation Security Manager (TSM) sent Complainant fitness for duty examination (FFDE) paperwork, which requested that Complainant provide a completed FFDE questionnaire no later than January 21, 2020. The TSM resent the FFDE paperwork to Complainant on January 8, 2020. On January 22, 2020, Complainant emailed the TSM a copy of the FFDE questionnaire signed by her doctor. On March 4, 2020, the Agency requested that Complainant submit a supplemental FFDE questionnaire no later than March 18, 2020, because the initial questionnaire was incomplete.

After being on continuous FMLA leave from October 24, 2019, through January 30, 2020, Complainant returned to work on February 3, 2020. On December 16, 2019, a Transportation Security Inspector (TSI) had been appointed to conduct an administrative inquiry to determine whether RDU supervisors were allowing TSOs to circumvent screening by bringing oversized liquids into the sterile area of the airport. Complainant alleged that, on February 3, 2020, she was required to meet with the TSI to discuss the incident at GSO on November 24, 2019. Complainant denied asking the TSO and the LTSO at GSO to allow oversized liquids into the sterile area of the airport. According to Complainant, on November 24, 2019, she asked the TSO and the LTSO if they could help her with her bags at the "ticket gate," which meant the ticket counter. The TSI concluded that there was no evidence that RDU supervisors allowed TSOs to bring oversized liquids into the sterile area.

On April 3, 2020, Complainant was issued a Notice of Proposed Removal for Inappropriate Conduct and Making a False Statement. The Notice cited four specifications of Inappropriate Conduct related to Complainant's alleged statements to the TSO, LTSO, and STSO at GSO on November 24, 2019. The Notice stated that Complainant made two false statements on February 10, 2020, when she provided a written statement as part of the administrative inquiry denying that she asked or suggested that Agency employees at GSO allow her to bypass screening and denying that she said that STSOs at RDU helped employees bypass screening by taking checked baggage and/or prohibited items to the gates for them. On April 29, 2020, Complainant was issued a Notice of Removal. The deciding official found that the preponderance of the evidence supported the charges and all specifications. Complainant appealed her removal to the Agency's Professional Responsibility Appellate Board. The Board sustained two specifications of Inappropriate Conduct, sustained two specifications of Inappropriate Conduct and the charge of Inappropriate Conduct, and found that the charge of Making a False Statement was not sustained. However, the Board denied Complainant's appeal, finding that the sustained charge of Inappropriate Conduct was sufficiently serious to warrant removal.

Complainant initiated EEO counselor contact on February 27, 2020. On May 11, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Black/African American), sex (female), disability (physical), and reprisal for prior protected EEO activity when:

1. From December 2019 to January 2020, management officials repeatedly asked Complainant for medical documentation and information while she was on leave;
2. On February 3, 2020, management required Complainant to meet with an investigator regarding an incident at another airport;
3. On December 20, 2019, and March 4, 2020, management recommended Complainant for a fitness-for-duty evaluation;
4. On September 5, 2019, Complainant was issued a LOR; and
5. On April 29, 2020, management terminated Complainant's employment.

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 EEOC Administrative Judge (AJ). Complainant timely requested a hearing. The AJ assigned to the case granted the Agency's Motion to Dismiss claim (4) as an untimely filed discrete act. The AJ granted the Agency's motion for summary judgment, finding that Complainant was not subjected to discrimination based on race, sex, disability, and/or reprisal.

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

We find that the AJ properly dismissed claim (4) as an untimely filed discrete act. Complainant initially stated that she received the LOR on March 16, 2020. However, the record is clear that Complainant received the LOR on September 5, 2019, and that March 16, 2020, was the date of the grievance decision. Even considering the LOR as part of Complainant's harassment claim, Complainant cannot show an evidentiary connection between the LOR and her membership in any protected class.

As the AJ noted, Complainant's position as a TSO is subject to the Aviation Transportation and Security Act (ATSA). The ATSA requires that security screeners "demonstrate daily a fitness for duty without any impairment due to illegal drugs, sleep deprivation, medication, or alcohol," 49 U.S.C. § 44935(e)(2)(A)(v), and "possess basic aptitudes and physical abilities..." Id. § 44935(f)(1)(B). Nevertheless, the Commission has held that the ATSA does not divest the Commission of jurisdiction over a complaint brought by a TSO against the Agency under the Rehabilitation Act or other statues the Commission enforces. Kimble v. Dep't of Homeland Sec., EEOC Appeal No. 0120072195 (Nov. 24, 2009). Under the Rehabilitation Act, employers may require a medical examination or make disability related inquiries of an employee only if the examination is job-related and consistent with business necessity. See Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (July 27, 2000) (web version) (Guidance), at 5. This requirement is met when the employer has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform the essential job functions is impaired by a medical condition; or (2) that an employee poses a direct threat due to a medical condition. See Guidance at 14.

In the instant case, on October 30, 2019, Complainant updated her FMLA request pursuant to her doctor's recommendation that she be excused from work from October 24, 2019, through December 6, 2019, due to ongoing pain and difficulty walking.

On December 9, 2019, Complainant informed the Agency that her "disability had extended" and called out sick through January 9, 2020. The Agency initiated the FFDE process because Complainant's extended absence was for a condition with an impact on her ability to perform the essential functions of her job. Complainant stated that her doctor was uncomfortable providing information about her restrictions while she was still on leave and recovering but, at the time the Agency initiated the FFDE process, the January 21, 2020, deadline to return the FFDE paperwork was after Complainant was due to return to work. Complainant provided some FFDE documentation on January 22, 2020, but the paperwork was not complete. Although Complainant challenges the need to provide additional FFDE paperwork in March 2020 after she returned to work, she does not dispute that she had not submitted a complete FFDE questionnaire at that point. We find that the Agency's requests for medical documentation and the FFDE were job-related and consistent with business necessity.

Complainant argues that Caucasian and male employees were not required to provide the amount of medical documentation asked of her or to undergo a FFDE while on leave. However, even if we were to assume a prima facie case of discrimination, the Agency, as discussed above, had a legitimate, nondiscriminatory reason for requesting the medical documentation and the FFDE based on its reasonable belief that Complainant could not perform the essential functions of her job in accordance with the ATSA. Complainant has not established that the Agency's proffered explanation was pretextual.

The Agency's legitimate, nondiscriminatory reason for removing Complainant was based on her representation to employees at GSO that STSOs at RDU helped airport employees circumvent screening procedures. Even assuming that Complainant asked the GSO employees if someone could help take her bags to the "ticket gate" rather than to the departure gate, this is insufficient to establish pretext for discrimination. Complainant argues that male and Caucasian employees who engaged in misconduct were not subjected to removal actions. However, Complainant does not allege that the male and Caucasian employees made representations about intentional breaches of the Agency's screening procedures. Complainant contends that she was a good employee who received performance awards. The record reflects that the deciding official considered Complainant's performance, as well as her length of service and statements from coworkers indicating that Complainant got along well with her coworkers in considering the appropriate penalty. Complainant observes that the Professional Responsibility Appellate Board found the removal action was not supported by finding certain specifications not sustained.

Ultimately, the Board denied Complainant's appeal, finding that removal was an appropriate penalty based on the two sustained specifications of Inappropriate Conduct.

Complainant alleged harassment with respect to being required to meet with the TSI on her first day at work after extended leave. The record reflects that the TSI contacted Complainant in January and that Complainant indicated that she could meet with the TSI after she returned to work. Complainant was required to meet with the TSI as part of the administrative inquiry before she could return to the floor. Complainant has not identified any evident connection between her race, sex, disability, and/or prior protected activity and the alleged harassment. We agree with the AJ's determination that Complainant cannot establish that she was subjected to a hostile work environment.

Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, including those not specifically addressed herein, 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 implementing 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