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

[redacted]
Geraldine G.,[1]
Complainant,

v.

Douglas A. Collins,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023001920

Agency No. 200P-0907-2021104406

DECISION

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 February 14, 2023, final decision concerning her equal employment opportunity (EEO) complaint alleging employment 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 decision.

ISSUE PRESENTED

The issue presented is whether the Agency properly found that Complainant did not establish discrimination as alleged.

[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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Program Support Assistant and Contracting Officer Representative (COR) at the Agency's Snake River Canyon National Cemetery in Buhl, Idaho.

On August 14, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on her disability (mental) when on June 9, 2021, Complainant resigned due to a hostile work environment (constructive discharge).

The EEO investigation revealed that Complainant alleged a hostile work environment, including accusations that she was defiant, lacked candor, and argumentative. Specifically, regarding her COR duties, Complainant's first-line supervisor ("Supervisor") emailed Complainant, "[n]ot sure why you want to stir up controversy and problems. But you do…" The Director added that Complainant's "tone is crossing many lines. Communicating with [the Supervisor] is not a drawn-out debate, it's not always on your terms, it's not a negotiation, and it's not going to turn personal. This is unprofessional, insubordinate…You are also defiant, lack candor, argumentative, engage others from an emotional/personal standpoint, and don't understand your role…" Report of Investigation (ROI) at 87, 118-19.

Complainant also complained that she was physically assaulted by a Maintenance Contractor on May 26, 2021. She completed a report detailing that she was in a vehicle when the Maintenance Contractor was blocking the exit while he was pressure washing the gate and fence. When the Maintenance Contractor saw Complainant, he moved and sprayed the front of her vehicle, and she was hit in her face and mouth. Complainant believed that there was a chemical in the spray, but the Maintenance Contractor responded that it was just water. The following day, Complainant saw the Maintenance Contractor upon her arrival and called him on the telephone. He stated, "if you have a question for me, you can get out of your car, walk over to me and ask me the question." Complainant then saw the Maintenance Contractor yell at the Site Manager that things were not yet set up for a service. The Maintenance Contractor walked over to Complainant and apologized that things were not set up, and stated they were running ten minutes late. On June 4, 2021, Complainant confirmed that she had not seen the Maintenance Contractor since. ROI at 89, 483-4, 471.

Complainant emailed the Supervisor on June 9, 2021, that Friday would be her last day. ROI at 218.

The Maintenance Contractor and the Site Manager did not provide affidavits for the instant EEO investigation. However, the Chief of Operations conducted a fact-finding into various allegations at the Snake River Canyon National Cemetery, including the spraying incident and the alleged yelling the following morning. The Maintenance Contractor and the Site Manager both denied any yelling on May 26, 2021. The Maintenance Contractor also averred that he sprayed water on the ground and not Complainant's car, and that some mist went over the bumper and hood. ROI at 584, 588, 607.

The Agency accepted Complainant's claim as a mixed-case complaint.[2] ROI at 46-9. On May 9, 2022, the Agency issued a final decision and concluded that Complainant did not meet her burden to show that her resignation was a result of intolerable working conditions. The Agency provided appeal rights to the Merit Systems Protection Board (MSPB).

Complainant filed an appeal before the MSPB. On September 2, 2022, the MSPB dismissed the appeal in Docket Number SF-0752-22-0377-I-1. The MSPB determined that Complainant did not allege objectively intolerable working conditions. The MSPB noted that Complainant used increasingly alarming language to describe being splashed with water when she stated that it was a "physical assault" that constituted workplace violence. The MSPB found this single event did not reach the level of workplace violence and hostility that would warrant a decision to leave one's employment. In addition, while Complainant's managers sent emails that were critical of Complainant and could be perceived as curt or dismissive, they did not rise to the level of intolerable working conditions. The MSPB concluded by dismissing Complainant's appeal for lack of jurisdiction over her claims of discrimination or harassment.

Complainant filed a petition for review of the MSPB's decision with the Commission. The Commission's decision found that there was little point in continuing to view the matter as a mixed-case based on the MSPB's lack of jurisdiction.

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[2] A mixed-case complaint is a complaint of employment discrimination filed with a federal agency, related to or stemming from an action that can be appealed to the Merit Systems Protection Board. 29 C.F.R. § 1614.302(a)(1). The Agency also processed the non-mixed-case claims, for which Complainant requested a hearing before an EEOC Administrative Judge (AJ). The AJ issued a decision without a hearing finding no discrimination in EEOC Case No. 550-2022-00180X. Complainant did not appeal the Agency's final order adopting the AJ's decision.

The matter was remanded back to the Agency for processing as a non-mixed-case complaint. Corrina M. v. Department of Veterans Affairs, EEOC Appeal No. 2020003207 (October 12, 2022).

Upon remand, the Agency informed Complainant of her right to her right to request a hearing before an EEOC Administrative Judge (AJ). When Complainant did not request a 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 Agency found that Complainant was an individual with a disability and assumed that she was qualified for her position. However, even crediting the events as described by Complainant, they did not rise to the level of intolerable working conditions that would compel an employee to resign. The Agency concluded that Complainant did not prove discrimination as alleged.

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant disagrees with the Agency's final decision regarding her involuntary resignation claim. She asserts that she resigned due to six (6) months of ongoing harassment. Complainant contends that management refused to train the Maintenance Contractor according to the contract, and they ignored her emails for his training. Complainant also avers that her managers refused to follow up regarding her assault allegation, and they did not believe her assault report.

The Agency opposes Complainant's appeal but offers arguments for Complainant's non-mixed-case claims that were addressed by the EEOC AJ.

Complainant filed a reply to the Agency's opposition on April 6, 2023. She notes that the Agency did not address her involuntary resignation claim, but her other complaint, and she should be able to appeal each case separately.[3]

[3] The Commission's regulations provide that "[a]ny statement or brief on behalf of a complainant in support of the appeal must be submitted to the Office of Federal Operations within 30 days of filing the notice of appeal." 29 C.F.R. §1614.403(d). In addition, the Commission does not generally allow parties to submit multiple briefs. See Joellyn L. v. Dep't of Justice, EEOC Appeal No 0120170274 (Apr. 5, 2019), citing 29 C.F.R. § 1614.403(d). Complainant filed her appeal on February 14, 2023. As such, we will only consider her initial timely brief. To the extent that Complainant wants to

STANDARD OF REVIEW

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").

ANALYSIS

Constructive Discharge

A discriminatory constructive charge occurs when an employer, motivated by discriminatory animus, creates working conditions that are so difficult, unpleasant, or intolerable that a reasonable person in Complainant's position would feel forced to resign. See Cullors v. Dep't of Defense, EEOC Appeal No. 01A41560 (Jun. 27, 2006). The Commission has established three elements which a complainant must prove to substantiate a claim of constructive discharge: (1) a reasonable person in the complainant's position would have found the working conditions intolerable; (2) the conduct that constituted discrimination against the complainant created the intolerable working conditions; and (3) the complainant's involuntary resignation resulted from the intolerable working conditions. Clemente M. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120160661 (Mar. 11, 2016), citing Walch v. Dep't of Justice, EEOC Request No. 05940688 (Apr. 13, 1995).

On appeal, Complainant argues that she had no choice but to resign due to six (6) months of ongoing hostile working conditions. She complains that management officials refused to train the Maintenance Contractor, despite her repeated requests.

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appeal the decision for her other EEO complaint, the final order was issued on February 17, 2023, and receipt was presumed within five (5) calendar days. Her request on April 6, 2023, was past the 30-day deadline to appeal.

Complainant asserts that she was physically assaulted by him on May 25, 2021, but that the Agency required that she continue working with him, despite her fears for her physical safety. However, Complainant confirmed to the Supervisor on June 4, 2021, that she had not seen the Maintenance Contractor since May 26, 2021. ROI at 471. Complainant did not indicate any additional encounters with the Maintenance Contractor through her resignation, effective June 11, 2021.

Even crediting Complainant's version of events, she did not show that a reasonable person in her position would have found the working conditions intolerable. While Complainant avers fearing for her safety after the physical assault and purported yelling, we do not find that a reasonable person would have been so afraid of the Maintenance Contractor to resign. Further, Complainant's complaints about his lack of training did not raise any previous conduct issues, but rather, that he was not setting headstones correctly.

While Complainant may have believed that her managers' emails were harassing, she has not shown that their admonishments about her conduct were either discriminatory or intolerable. The Commission has found that an extremely difficult and upsetting employment situation is not enough for a reasonable person to find working conditions intolerable. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120121920 (Jun. 25, 2014) ("dissatisfaction with work assignments, a feeling of being unfairly criticized or difficult or unpleasant working conditions are not so unreasonable as to compel a reasonable person to resign," quoting Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994)). To compare, the Commission found a constructive discharge after an employee resigned due to the open and repeated use of racial epithets in front of multiple witnesses in Complainant v. Department of the Air Force, EEOC Appeal No. 0120123332 (September 10, 2014).

Accordingly, we find that Complainant did not establish disability discrimination for her constructive discharge claim.

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 as alleged.

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