



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

[REDACTED]
Roxana Y.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023002074

Agency No. 200P-691-2022-142903

DECISION

On February 14, 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 January 25, 2023 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.

ISSUES PRESENTED

Whether the Agency properly found that Complainant was not subjected to 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

Complainant worked as a Medical Supply Technician, GS-0622-06, at the Greater Los Angeles Healthcare System in Los Angeles, California. Complainant was assigned to the Sterile Processing Service (SPS).

On February 2, 2022, Complainant filed an EEO complaint alleging that the Agency subjected her a hostile work environment on the basis of sex (female) as evidenced by multiple incidents occurring between May and November 2021. In addition, Complainant alleged that the Agency subjected her to discrimination on the basis of sex (female) when on or about November 24, 2021, Complainant's work hours were changed.

Complainant identified the evening shift supervisor (SE) as the responsible management official. As witnesses, she identified the day shift supervisor (S1), the Assistant SPS Chief (S2), the SPS Chief (S3), and several coworkers.

Complainant alleged that between May and November 2021, SE engaged in several acts of overt sexual harassment, including asking her out for dinner; asking her to go to his car on two occasions; making comments about her looks and appearance; touching her hand; looking at her in a flirtatious manner; and using another employee to pressure her to go out with him. IR 60-61, 64-69. She further alleged that SE had been giving her a hard time at work by failing to provide her with assistance when she needed it, micromanaging her work, complaining about the work she was leaving for the evening shift, and demanding that she stay at work when her shift was over. IR 69-79. SE denied all of Complainant's sexual harassment allegations. IR 85-97, 99, 101-04, 106.

On November 2, 2021, Complainant reported SE's conduct to S2 via email. S2 stated that after she received the email from Complainant, she called Complainant into her office to discuss the matter, apologized to Complainant, and directed that a fact-finding be commenced. The fact-finding was conducted between November 18 and December 8, 2021. Complainant and SE were both issued no-contact letters and separated from each other for the duration of the fact-finding.

By memorandum dated November 8, 2021, S3 notified SE that, effective immediately, he would be temporarily assigned to the SPS in a non-supervisory role pending the outcome of the fact-finding. The memo also stated that SE was not to have any contact with Complainant. IR 243.

Reports of contact from Complainant's coworkers generated by the fact-finding indicated that, while several female SPS employees expressed that they were uncomfortable around SE because of his abrupt and abrasive management style, they stated that SE never asked them out or otherwise sexually harassed them. IR 255, 271-72. One employee stated that she saw SE staring at her, but that he never asked her for a date or approached her. IR 273-74. Another employee told the fact-finder that she observed SE treating Complainant differently, yelling at Complainant during a meeting. IR 277-78.

The results of the fact-finding indicated that, while Complainant's allegations of sexual harassment were unsubstantiated, SE did create a hostile work environment for several female employees, and that this was due to SE's frustrations about the workload and the pressures of tight deadlines. After consulting with the Employee and Labor Relations Office, S2, with S3's concurrence, issued a letter of expectations dated February 7, 2022, to SE in which he was admonished to improve his communication with his subordinates. The no-contact orders remained in effect until Complainant's subsequent departure from the facility. IR 243-44, 255-57, 263-68, 271-74, 277-85, 288-89.

As to the change-of-hours incident that allegedly occurred on November 24, 2021, when Complainant was asked by the EEO investigator what her work hours were before and after the schedule change, she merely answered, "Yes." Complainant also averred that it was S1 who informed her of the schedule change. IR 79-81. S1, S2, and S3 all averred that SE's schedule had been changed, not Complainant's. IR 133, 166. 192, 243, 245.

On May 13, 2022, Complainant took another position with the Agency that was outside of the SPS. IR 148-65, 174-75, 177-85, 187-88, 190-91, 244.

At the conclusion of the ensuing investigation, the Agency provided Complainant with a copy of the investigative report (IR) and notice of her right to request a hearing before an Equal Employment Opportunity Commission 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). In that decision, the Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

Complainant filed the instant appeal without submitting any arguments or contentions in support.

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

Disparate Treatment – Change of Hours

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). Complainant must initially 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. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n.14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of discrimination, a complainant must show that: (1) she is a member of a protected group; (2) she suffered an adverse employment action; and (3) the circumstances give rise to an inference of discrimination. We note that, although a complainant bears the burden of establishing a “prima facie” case, Burdine, 450 U.S. at 252-53, the requirements are “minimal,” Hicks, 509 U.S. at 506 (1993), and complainant's burden is “not onerous.” Burdine, *supra* at 253.

With respect to the change-of-hours incident, a preponderance of the evidence establishes that Complainant's duty hours were never changed. Rather, it was SE's tour that was changed in order to ensure that SE and Complainant remained separated. Since Complainant's hours were never changed, she did not suffer an adverse employment action and, ultimately, her prima facie case of disparate treatment in connection with the incident fails.

Sexual Harassment

In order to establish a prima facie case of sexual harassment, a complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her sex; (3) that the harassment complained of was based on her sex; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020).

Complainant satisfies the first two elements in that she is female and SE's alleged conduct towards her was certainly unwelcome from her own, subjective perspective.

As to the third element, the preponderance of the evidence does not substantiate that Complainant was subjected to sexual conduct by SE. There is no corroborating evidence demonstrating that any sexual conduct occurred as alleged. As to being yelled at, the fact-finding report does indicate that Complainant and other employees were shouted at by SE, but that this appears to be a result of SE's poor communications skills with his subordinates and his apparent inability to handle the pressures of his workload. Beyond her own affidavit testimony, she has presented neither affidavits, declarations, or unsworn statements from witnesses other than herself nor documents which contradict or undercut the explanations provided by S1, S2, or S3. She has likewise not presented any documentary or testimonial evidence which would cause us to question the truthfulness of these management officials as witnesses, or which tend to establish the existence of any of the indicators of discriminatory motive listed above.

Concerning the fourth element, we certainly agree that being yelled at frequently by a supervisor could reasonably be expected to unreasonably interfere with an employee's work performance or otherwise create an intimidating work environment. SE's conduct was certainly severe and pervasive enough to cause the Agency to immediately separate SE and Complainant, conduct a fact-finding as soon as Complainant reported the incidents, and issue what was in effect a letter of counseling to SE.

However, regarding the fifth element, the preponderance of the evidence establishes that the Agency took immediate and appropriate corrective action. As noted above, the Agency took action as soon as Complainant reported the incidents to S1, S2, and S3. They conducted the fact-finding, made a determination that Complainant was subjected to a hostile work environment but not sexually harassed, separated the parties, and issued no-contact orders to ensure that they would remain separated. Ultimately, the parties were separated until Complainant left the Agency, and management issued a counseling letter to SE, urging him to improve his communications skills with his staff. We further note that S2 consulted extensively with the Office of Employee and Labor Relations in order to ensure that the disciplinary measures she was contemplating were appropriate. Ultimately, we find that no basis exists for imputing liability to the Agency.

As Complainant chose not to request a hearing, the Commission does not have the benefit of an Administrative Judge's credibility determinations after a hearing; therefore, the Commission can only evaluate the facts based on the weight of the evidence presented. Micki C. v. Soc. Sec. Admin., EEOC Appeal No. 2022004926 (Aug. 19, 2024) citing Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130623 (Sept. 16, 2015). The weight of that evidence is not sufficient to establish that Complainant was subjected to discrimination or a hostile work environment for which the Agency can be held liable.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we AFFIRM the Agency's final 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

December 30, 2024
Date