



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Sunday S.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2023002159

Agency No. BOP-2019-00978

DECISION

On February 23, 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 February 22, 2023 final decision concerning an equal employment opportunity (EEO) complaint claiming 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 failed to demonstrate by a preponderance of the evidence that she was subjected to disparate treatment and a hostile work environment.

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

During the period at issue, Complainant worked as a Correctional Officer at the FCC-Coleman in Coleman, Florida.

On May 24, 2019, Complainant initiated EEO contact. Informal efforts at resolution were not successful. On September 11, 2019, Complainant filed a formal EEO complaint alleging that the Agency subjected her to disparate treatment and/or hostile work environment based on race (African-American), sexual orientation (self-described as "dated females"), and in reprisal for prior EEO activity.

The Agency determined that the formal complaint was comprised of the following claims:

1. From December 21, 2017 through December 6, 2019, FCC-Coleman management officials did not permit Complainant to work airlifts, Basic Prisoner Transport (BPT) posts, or outside hospital posts, for regular duty or overtime;
2. From April 28, 2018 through December 6, 2019, FCC-Coleman management officials denied Complainant the use of Personal Protection Equipment (PPE) gloves, after she notified FCC-Coleman officials of her latex allergy and filed a request for a reasonable accommodation;²
3. On April 9, 2019, Complainant learned that FCC-Coleman management officials did not select her for the two Correctional Officer (Senior Officer Specialist), vacancy announcement number COA-2018-0018;³
4. On April 9, 2019, Complainant learned that FCC-Coleman management officials did not select her for the position of Correctional Treatment Specialist, vacancy announcement number COA-2018-0047;

² We note that although this claim is discussed in terms of a "reasonable accommodation," Complainant did not raise disability as a basis.

³ As indicated in the Agency's final decision, the basis of reprisal was subsumed within a pending class action complaint, Turner v. Federal Bureau of Prisons, EEOC No. 0720110008 (Sept. 15, 2015), for claims 3 and 4, both of the non-selection claims.

5. On April 24, 2019, Complainant learned that FCC-Coleman conducted investigations beyond the 120-days that she believed was allotted. Additionally, Complainant alleged that FCC-Coleman management has kept her under continuous disciplinary investigation for eight years, while treating white, heterosexual, non EEO participants more favorably;
6. On May 7, 2019, FCC-Coleman management officials refused to respond to Complainant's emails requesting documentation regarding her daily assignment, thereby preventing her from responding to requests for information to settle an ongoing lawsuit.

After an 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). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

Complainant has been in her current position, a Correctional Officer, GS-07, since April 2009. She previously filed EEO complaints in 2012, 2015, and 2017. Report of Investigation (ROI) 1 of 5 at 86-87. From December 21, 2017 through March 1, 2020, Complainant was not permitted to work BPT, air lift BPT posts, outside hospital posts, regular duty, or overtime. BPT posts are armed posts where a correctional officer works at the hospital and guards an inmate who has been admitted to the hospital, and air lift BPT posts involve armed inmate transport to airports. ROI 1 of 5 at 89. Complainant testified that she was unable to work these posts because a nurse had reported that Complainant "looked at her strange." Id. at 90.

Around March 28, 2018, Complainant requested PPE gloves, because the blue gloves, which they had recently switched to, were causing her hands to break out. ROI 1 of 5 at 99. Previously, Complainant was sent over to a medical unit to have her hands examined, the medical staff concurred that Complainant appeared to be having a reaction to the gloves and stated that Complainant needed to wear "the purple gloves." Id. at 100. When Complainant started to run out of the purple gloves, she went to the Captain/Associate Warden's Secretary (race – Black, sexual orientation and prior EEO activity – not stated) to inform the Secretary that she was out of the purple gloves. Id. at 101.

The Secretary said she would send down more gloves, but she never did, according to Complainant.⁴ The next day, approximately March 29, 2018, Complainant followed up with Operations Lieutenant (Hispanic⁵, no sexual orientation stated, no prior EEO activity stated), and advised that she had been recycling the pair of gloves she had because the Secretary had not given her more gloves. Operations Lieutenant testified that he had the Nitrile Examination gloves, 100% Latex/Rubber Free and Powder Free and that the gloves were kept in medical. ROI 2 of 5 at 109. He also testified that he was the one who mandated that Complainant work shifts and stated that Complainant was issued gloves. Id. He further stated that the Secretary knew which gloves Complainant needed and order the gloves on a regular basis. Id. at 110.

On April 9, 2019, Complainant learned that FCC Coleman management officials did not select her two for the position of Correctional Officer (Senior Officer Specialist), vacancy announcement number COA-2018-0018. Complainant testified that she applied for the position during the vacancy period. ROI 1 of 5 at 115. Complainant also testified that she applied through USAJobs government website, but she was not selected for an interview. Id. at 121 and 125. She stated that the selectees had less time in their positions, and they were both male. Id. Complainant testified that she had almost 13 years in the position, she had received good evaluations, several awards for special acts, and time-off awards. Id. at 126. Complainant also indicated that she was on the "best qualified list." Id. at 128. Complainant stated that, to her knowledge, the selecting officials for the vacancies were the wardens of the facilities.

Vacancy announcement COA-2018-0018 listed the listed the series/grade as GL-0007 08. ROI 2 of 5 at 146. For vacancy announcement number COA-2018-0018, the Agency generated a certificate generated on April 23, 2018, with an expiration date of October 22, 2018, of Best Qualified candidates for the 35 available positions, signed and dated July 18, 2018. ROI 2 of 5 at 166-170.

⁴ The Associate Warden's Secretary's affidavit, ROI 2 of 5 at 75-77, was largely non-responsive. She stated, "I have no knowledge of this," to a majority of questions.

⁵ The Commission notes that the individual stated that his race is "Hispanic." The Commission considers the term "Hispanic" to denote a national origin rather than a race.

A second list of eligible for noncompetitive consideration for the position, with the same generation and expiration dates, also signed and dated July 18, 2018. Id. at 171-172. Complainant was not listed on either of the two lists for that vacancy announcement.

Vacancy announcement COA-2018-0147 listed the requisite Competencies/Knowledge, Skills and Abilities at a GL-09 and GS-11. ROI 3 of 5 at 42. A list of eligible for noncompetitive consideration for the vacancy announcement, GS-0101-09, generated November 1, 2018 and an expiration date of April 30, 2019, for three available positions, dated and signed December 31, 2018. Id. at 55. A best qualified list for the COA-2018-0147 vacancy announcement, again did not include Complainant. Id. at 56-58. The certification list for eligible noncompetitive candidates, for the vacancy announcement COA-2018-0147, GS-0101-11, with the same generation and expiration dates, and dated and signed on December 31, 2018, did not include Complainant. Id. at 59-60. A best qualified list at the same GS-level, for the same vacancy, with the same generation and expiration dates, only included two individuals, neither of whom were Complainant. Id. at 61.

Complainant testified that, on October 16, 2019, she was denied her request for the proper PPE gloves. ROI 1 of 5 at 120. Agency Form 100C, dated October 15, 2019, indicated that the reason for the denial was that “[the g]loves needed are already provided/available for use.” The form further noted that powder-free, nitrile gloves were already available, and a March 29, 2019 memorandum indicated that the gloves in stock met the requirements indicated by Complainant’s physician. ROI 2 of 5 at 6-7.

When asked why she thought that her sexual orientation was a basis for discrimination, Complainant stated that she had previously had a conflict with a fellow female employee who was more feminine in appearance, and management had taken the other employee’s side. ROI 1 of 5 at 131-132. Complainant also stated that people then treated her like differently, like she was an “aggressive lesbian.” Id. at 132.

Complainant alleged that the Agency senior management officials intentionally delayed the resolution of disciplinary investigations and impeded her career. Complainant stated that, when an individual is under investigation, the individual is supposed to get a clearance letter, but she never received one. ROI 1 of 5 at 148. She further stated that she was under investigation for eight-years. Id. at 150.

Complainant stated that she was uncertain of the details regarding investigations, but that she was suspended for one-day following the first investigation, and another time, she was suspended for two-days. Id. at 151. Complainant stated that subsequent investigations resulted in 10 and 14-day proposed suspensions, which did not take effect because the timeframe for discipline expiring. Id. She stated that these types of investigations occurred back to back for eight-years. Id. at 152. Complainant clarified that an incident would occur, and an investigation would follow, then another incident would occur, along with a corresponding investigation, and this would continue, and finally these incidents would be grouped, and the reprimand would be based on actions that occurred years ago.⁶ Id. Complainant reiterated that, while others, such as Caucasian men, would have their investigations, even multiple investigations, completed in 120-days, hers did not. Id. at 160.

Complainant stated that, in connection for a lawsuit for unpaid overtime reimbursement, she requested documentation of how many quarters she worked with the Agency. ROI 1 of 5 at 163. Complainant initially inquired to the Union for the information, but the Union did not have the information as far back as Complainant needed. Id. On April 23, 2019, Complainant emailed the Complex Captain (White, unknown, unknown). Id. at 164. She stated that the deadline for the information was May 16, 2019. Therefore, she inquired to the Complex Captain until May 15, 2019. Id. at 164-165. Complainant's inquiry was for how many quarters she worked in 2010. Id. at 166. Complainant stated that she believed she worked four quarters in 2010, but the information with the law firm handling the lawsuit, only had information regarding Complainant working one quarter in 2010. Id. at 167. Due to Complainant being unable to receive confirmation of how many quarters she worked in 2010, she was compensated for one quarter of overtime pay for 2010. Id. The Complex Captain stated that he was aware of Complainant's race, because she told him several times, but he said he was unaware of her sexual orientation. ROI 2 of 5 at 13. The Complex Captain stated that he referred Complainant to a Complex Administrative staff member, for her inquiry. Id. at 14. The Complex Captain stated that the request was received on May 7, 2019, and he was unaware if a staff member responded to the inquiry. Id. at 13. A copy of the May 7, 2019 email to the Complex Administrative staff member, requesting a copy of Complainant's daily assignments for January 1, 2010 through August 1, 2013. Id. at 16.

⁶ This clarification occurred when Complainant was questioned during the investigative examination on May 13, 2020.

The email also includes a conversation, dated May 1, 2019, between Complainant and another individual in which Complainant asked who she should make the inquiry regarding her assignments prior to 2013. Id. The person responded that Complainant should make her inquiry to the Complex Captain. Id.

The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

The instant appeal followed. On appeal, Complainant does not submit any statements or briefs. Complainant submits documents already in the record.

The Agency filed a brief in opposition of Complainant's appeal. The Agency requests its finding of no discrimination be affirmed.

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 AND FINDINGS

Disparate Treatment

A claim of disparate treatment is examined under the three-party analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

To establish a prima facie case of reprisal, Complainant must show that (1) he engaged in protected EEO activity; (2) the Agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the Agency; and (4) a nexus exists between his protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

We find that she fails to establish a prima facie case of disparate treatment. Even if Complainant was able to establish her prima facie case, we find that she failed to demonstrate that she was subjected to unlawful discrimination, as discussed below. For example, as noted by the Agency, Complainant addressed unnamed comparators whom she claimed had committed rules violations while on BPT duty, but who were treated more favorably. However, Complainant provided no detail necessary. She makes not showing that any of the comparators had the same number and type of disciplinary actions pending at the time of their alleged BPT rules violations.

Regarding non selections, again we agree with the Agency. There is no evidence of record reflecting any connection between Complainant's identified non selections, and her raised bases. The record, instead, reflects that Complainant did not present qualifications sufficient to meet the criteria for further consideration.

Harassment

To establish a prima facie case of race, sexual orientation, and or reprisal harassment, a complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that he or she was a member of a statutorily protected class; (2) was subjected to unwelcome conduct related to their statutorily protected membership; (3) that the harassment complained of was based on their statutorily protected membership; (4) that the harassment had the purpose or effect of unreasonably interfering with their 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).

While Complainant asserted a claim of harassment, and that she is a member of at least one statutorily protected class, the Agency's conduct was all within the regular course of business. Complainant does not provide evidence to demonstrate that any of the Agency's conduct was based on Complainant's statutorily protected bases.

Claim 1

The Deputy Captain (race – White, sexual orientation – not stated, no prior activity) testified that they had never discussed Complainant's race with her, and only became aware that she was African-American through the instant complaint. ROI 2 of 5, at 38. The Deputy Captain further testified that, to his knowledge, having only transferred in 2020, Complainant was not permitted to work BPT posts. Id. at 39. The Deputy Captain also stated that he was unaware of who issued the restriction, but it was explained to the Deputy Captain that Complainant was restricted from working BPT posts due to allegations made by community medical staff. Id. Deputy Captain subsequently inquired as to whether there were any active cases against Complainant, and when he found out there were none, Deputy Captain reinstated Complainant to work BPT posts. Id.

The Agency articulated its nondiscriminatory rationale for its actions. On appeal, Complainant does not proffer any evidence or arguments demonstrating that the Agency's rationale is pretext for unlawful discrimination. Additionally, the record does not support the conclusion that the Agency's actions were based on discriminatory animus. It is unclear why Complainant was unable to work the BPT posts, but when the issue was brought to the Deputy Captain's attention, he reinstated Complainant's ability to serve BPT posts.

Claim 2

While Complainant's glove request was denied, the denial stated that the use of Nitrile Examination gloves, (100% Latex/Rubber Free and Powder Free), were *already* available to Complainant. Complainant did not provide any arguments or evidence on appeal. Complainant's and Agency officials' testimonies indicate that there was confusion by Complainant regarding the Nitrile Latex/Rubber Free and Powder Free gloves, as opposed to the color of the gloves.

Complainant believed that only gloves of a certain color were Nitrile Latex/Rubber Free and Powder Free gloves, while Agency officials continued to communicate that the gloves she requested, and that her medical documentation indicated were necessary, were already available to her. The evidence does not support a finding of discrimination with regard to this claim.

Claims 3 and 4

Complainant could establish pretext by showing that her qualifications are observably superior to those of the selectees. See Bauer v. Bailar, 647 F.2d 1037, 1048 (10th Cir. 1981). On appeal, Complainant does not submit any evidence or arguments to support a contention that she was a plainly superior candidate, and she was discriminated against on the bases of race and/or sexual orientation. Complainant has not met her burden by demonstrating that she was a plainly superior candidate for the position and the Agency's hiring officials chose not to hire her based on her race, sex, and/or sexual orientation. Therefore, Complainant has not established that management's articulated reason for her non-selection was a pretext for unlawful discrimination. We affirm the Agency's finding of no discrimination.

Claims 5 and 6

Complainant alleged that the Agency continuously subjected her to investigations, while white, heterosexual employees, without prior EEO activity, were not subjected to the same treatment. Complainant had numerous disciplinary actions against her. The record does not support Complainant's assertion that Agency officials targeted her through these investigations. Complainant does not submit evidence to substantiate this claim. We find that the Agency did not subject Complainant to unlawful discrimination when it subjected Complainant to, seemingly both consecutive and concurrent, investigations.

Complainant asserted that Agency officials ignored her request for information needed for compensation of overtime wages, in connection to a lawsuit. While Complainant stated that she began making inquiries to the Complex Captain on April 23, 2019, the Complex Captain, supported by a May 7, 2019 email from Complainant, indicate that was inaccurate. Complainant, instead, did not reach out to the Complex Captain until at least May 1, 2019, and his supporting staff on May 7, 2019. She stated that the deadline for the information was May 16, 2019.

While the Complex Captain stated that he was aware of Complainant's race and prior EEO activity, Complainant did not submit evidence and the record does not support the conclusion that Complainant's inquiries were ignored based on discriminatory animus. Additionally, Complainant did not reach out to the individual who would be able to assist her until May 7, 2019, nine-days prior to the information needing to be submitted.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we AFFIRM the Agency's finding of no discrimination for the reasons discussed above.

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