



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

[REDACTED]
Kristle L,¹
Complainant,

v.

Dorothy Fink,
Acting Secretary,
Department of Health and Human Services
(National Institutes of Health),
Agency.

Appeal No. 2023002164

Hearing No. 531-2020-00267X

Agency No. HHS-NIH-NHLBI-019-19

DECISION

On February 23, 2023, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 24, 2023 final order 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

During the relevant time, Complainant worked as a Program Director, GS-14, at the Agency's Advanced Technologies and Surgery Branch, National Heart, Lung and Blood Institute in Bethesda, Maryland.

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 March 15, 2019, Complainant filed a formal complaint alleging that the Agency discriminated against her based on race (Caucasian), religion (Catholic), age (55), and reprisal for prior protected EEO activity when:

1. On October 26, 2018, her former supervisor informed her in a one-on-one meeting, that 'your[re] bulldog traits will hurt you' and that she would receive a rating of '2' for critical element '4' on her PMAP [Performance Management Appraisal Program] if she did not send a 'correction' to their colleagues. Complainant believed this comment to be sexist, as the males in her office seem to be treated with more respect and are allowed to be firm in their opinions and manners, but she is not, because she is female.

2A. though 2I. Between 2005 and August 21, 2018 Complainant was subjected to a hostile work environment as described in nine incidents.

3. On February 12, 2019, since Complainant started the EEO complaint process in October 2018, she learned the narrative on her 2018 PMAP revealed new issues that were not noted or discussed during her 2018 PMAP mid-year review. Complainant states that she noticed other mistakes in the narrative, which were discussed with her Supervisor. Complainant also states this was the lowest PMAP rating she ever received.

4. On April 24, 2019, Complainant was removed from the NIH VPN users' group without prior notice;

5. On June 27, 2019, Complainant received an email from her Supervisor asking for monthly written reports of her activities and accomplishments. Complainant believed this request to be retaliatory;

6. On July 2, 2019, Complainant's presentation was denied at the National Academies, expected July 17, 2019. Complainant believed this denial has harmed her career and is retaliation based on her EEO activity;

7. On June 25, 2019, Complainant was denied access to her Branch staff meeting. Complainant believed this denial to be retaliatory.

8A. On August 5, 2019, during her PMAP meeting, Complainant was intimidated during part of the conversation, when her supervisor said she plans to give her a rating of 2 on Critical Element 4 of her PMAP;

8B. On August 5, 2019, during Complainant's PMAP meeting, the ER Specialist, stated that her supervisor was entitled to mandatory monthly one-on one meetings to go over work activities. Complainant states that when she asked for written HR policy guidance supporting this statement, the ER Specialist stated that there is an HR policy for the removal of an employee and that she would send that information to her. Complainant states that her supervisor "chimed in" and said, "Yes, I would like to see the guidance you just mentioned about the removal of an employee." Complainant states that she felt threatened by this conversation.

9. On September 30, 2019, Complainant's supervisor threw out her personal documents which she believed were related to her work and professional development. Complainant believed this to be retaliatory in regarding her current EEO activity.

After its investigation, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant timely requested a hearing. The Agency submitted a motion for a decision without a hearing. Complainant opposed the motion.

With the exception of claims 3. and 8A. the AJ dismissed all claims regarding disparate treatment as untimely raised with an EEO Counselor in that the matters therein occurred more than 45 days before Complainant initiate EEO Counselor contact on December 10, 2018. Similarly, the AJ dismissed claims 2A. through 2E. as untimely raised with an EEO Counselor, and that they were insufficiently connected with Complainant's timely allegations of harassment, 2F through 2I. The AJ subsequently issued a decision by summary judgment in favor of the Agency. The Agency issued its final order adopting the AJ's finding of no discrimination.

The instant appeal followed. On appeal and through Counsel, Complainant's counsel maintained that Complainant had been subjected to a long-standing and ongoing campaign of harassment conducted by her current and former supervisors and therefore the AJ improperly dismissed many of the harassment claims as untimely raised with an EEO Counselor.

Complainant further stated that the AJ had made inappropriate credibility determinations that were not in the light most favorable to Complainant. On those claims that were not dismissed, Counsel contested the AJ's findings. Counsel insisted that Complainant had made her prima facie case for disparate treatment, reprisal and harassment.

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. 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. (as revised, August 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).

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 fact-finder could not find in Complainant's favor.

As an initial matter, we concur with the AJ regarding the dismissal of Complainant's untimely claims. Among the dismissed claims were that Complainant has been denied promotion opportunities. However, the last time she applied for promotion occurred years before her EEO Counselor contact. The AJ appropriately concluded that Complainant's assertion that the alleged incidents were continuous and therefore timely did not account for the vast differences in time and substance which distinguished her claims as discrete matters rather than part of an ongoing pattern.

We disagree with Counsel that the AJ's no-discrimination findings on Claims 3. and 8A. rested on inappropriate credibility determinations. In Claim 3., Complainant accused her supervision of adding new areas needing improvement to the narrative portion of her performance evaluation that were not discussed during her performance period. In Claim 8A., Complainant's supervisor threatened to downgrade her performance rating to a low score of two in the Communication and Teamwork element. Complainant's supervisor and former supervisor described reasonable justifications. We determine, as did the AJ, that the record did not show that supervisors' concerns about Complainant's communications and teamwork were unfounded and therefore pretextual. For example in March 2019, Supervisor invited Complainant to monthly, one-on-one meetings to discuss her program. Complainant declined and insisted that a third party be present to witness such meetings. Management determined that this was neither feasible nor required, so in June 2019, Supervisor instructed Complainant to provide reports on monthly accomplishments, instead of having to attend monthly meetings. Complainant did not do so until September 2019. On a prior occasion, moreover, Complainant refused to follow her former supervisor's instruction to send a correction email, after misinforming colleagues that she was not the proper point of contact for their grant applications, when she was in fact the subject matter expert for such grant applications within her program. Complainant had been antagonistic to constructive criticism and insubordinate or erroneous in her communications. Ultimately, Complainant received a rating of three on this element. Upon careful review, we determine that the AJ's analysis on the timely performance evaluation claims was sound.

Regarding Complainant's timely harassment allegations, we did not see sufficient evidence that the adverse conduct was based on Complainant's protected statuses. Without more evidence, Complainant cannot support her position that statements, such as her former supervisor saying, "Your bulldog traits will hurt you," were targeted against her sex, age, religion or race. For the reprisal actions claimed, the record did not reveal evidence of retaliatory motive beyond temporal proximity. We further find that events such as Complainant temporarily losing Agency network access or missing a meeting because of connectivity issues are common workplace occurrences as opposed to incidents that make the workplace a hostile one.

After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Commission to affirm the Agency's final order, because the AJ's issuance of a decision without a hearing was appropriate and a preponderance of the record evidence does not establish that discrimination occurred.

Accordingly, we AFFIRM the Agency's final order adopting 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 5, 2025

Date