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

[redacted]
Georgeann R.,[1]
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2023002245

Hearing No. 420-2022-00053X

Agency No. ARREDSTON21JUNO2084

DECISION

On March 6, 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 8, 2023 final order concerning an 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.

ISSUE PRESENTED

Whether the evidence shows that the EEOC Administrative Judge (AJ) committed reversible error when he granted summary judgment on all claims and found no discrimination?

BACKGROUND

During the period at issue, Complainant worked as a Licensed Practical Nurse (LPN), GS-6, at the Agency's Fox Army Health Clinic (FAMC), Patient Centered Medical Home, at Redstone Arsenal, Alabama.

[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.

At all relevant times, Complainant's direct supervisor was a Registered Nurse; her second-level supervisor was the Assistant Chief for nursing. Complainant's third level supervisor was the Patient Centered Medical Home's director, who was a Colonel.

On July 30, 2021, Complainant filed a formal EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American) and color (Black) when:

1. In 2018, Registered Nurse locked Complainant in a utility room located in FAMC and, during this same timeframe, Registered Nurse did not certify her timecard.

2. On February 3, 2020, she alleges Registered Nurse pulled her bonnet, which pulled her hair, resulting in her notifying Lieutenant Colonel and law enforcement. However, Registered Nurse was not charged. As a result of the incident, Complainant requested to be moved from Primary Care Medical Health due to safety, but her request was denied.

3. During the period December 2020 – June 8, 2021, Colonel treated her differently after a doctor falsely reported her for unsafe practices, and he removed her from her job and placed her in the laboratory pending an investigation without following Defense Health Agency (DHA) protocol for unsafe practices.

4. In February 2021, Complainant was denied Family & Medical Leave Act (FMLA) by Assistant Chief.

5. In February 2021, during a conversation with another LPN, Complainant became aware that Registered Nurse changed her timecard and did not certify the changes to her timecard, which was the reason she received a $12 check for the pay period ending February 27, 2020, even though she had worked 80 hours. In addition, she stated she informed Human Resources and the Deputy Commander for Nursing every pay period thereafter about the inaccurate pay.

6. On June 8, 2021, during a conversation with the Population Health Nurse, Complainant became aware that during the period of December 2020 through June 8, 2021, Colonel subjected her to disparate treatment when he removed her as the screening LPN in December 2020.

7. On August 31, 2021, she became aware, after speaking with Human Resources, that she did not receive a time-off award on her 2021 annual performance appraisal compared to her co-workers who received awards, including her union representative (time off award – 24 hours), a coworker (time off award – 24 hours), and another co-worker (time off award – 24 hours).

8. On September 3, 2021, Colonel issued her a Memorandum for the Record (MFR), Directive for Return, dated September 2, 2021, along with an MFR, Operating Procedures – Leave Usage, dated November 12, 2020, Code of Conduct guidelines, and

> Commander Policy #15, Prevention of Violence and Disruptive Behavior in the Workplace, and required her to attend new hire orientation, which he has never required any staff to attend after nine years of employment. This occurred during a meeting with the acting Lead Nurse, and Union Representative.

After investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC AJ. Complainant timely requested a hearing. Over Complainant's objections, the assigned AJ granted the Agency's March 8, 2022, motion for a decision without a hearing. On January 23, 2023, the AJ issued a decision by summary judgment in favor of the Agency. The Agency subsequently issued a final order adopting the AJ's finding of no discrimination.

The instant appeal followed.

STANDARD OF REVIEW

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). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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

The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249.

At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for 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 "material" fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, Complainant's appeal did not identify deficiencies in the record nor present evidence to challenge the material facts of record.

Disparate treatment claims are examined under the three-party analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For a complainant to prevail, they must first establish a prima facie 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 Constr. 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 Cmty. 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 Ctr. v. Hicks, 509 U.S. 502 (1993).

Undisputed facts of record fully support the AJ's determination that responsible management officials have articulated legitimate, non-discriminatory reasons for the Agency actions at issue.

Regarding Claim 1, the record revealed that no one actually locked Complainant in a room. Complainant alleges Registered Nurse blocked her way as they left a meeting. Apparently at that moment, Complainant attempted to leave the meeting to use the restroom.

Regarding Claim 2, Complainant testified that Registered Nurse briefly touched a bonnet that Complainant was wearing to ask what it was, as Complainant had not worn a bonnet to work previously. Complainant requested Registered Nurse not touch her, and Complainant does not allege Registered Nurse ever did so thereafter.

Regarding Claim 3 and Claim 6, management explained that because Doctor objected to working with Complainant after reporting that Complainant had violated safety rules, Complainant was temporarily reassigned to the laboratory.

Regarding Claim 4, Complainant's FMLA request was delayed but ultimately granted. The Agency denied that the delay was anything but an administrative error.

Regarding Claim 5, the record showed that management officials took Complainant's claims of payroll irregularities seriously and made efforts to assist Complainant in making corrections.

Regarding Claim 7, Complainant did not receive a time-off award because unlike her coworkers who did receive one, Complainant did not work in the Patient Centered Medical Home for a significant portion of the evaluation period.

Regarding Claim 8, the record showed that Colonel explained he issued the MFR and directed Complainant to initial training because Complainant was returning to the Patient Centered Medical Home after a period of extended absence.

It was Complainant's burden to establish the existence of an unlawful motivation on the part of the responding management officials by a preponderance of the evidence. More is required than her stated beliefs and unsupported surmises. We therefore find, as did the AJ and Agency that Complainant failed to meet her burden of proof as to the existence of a discriminatory motive on the part of the responding individuals with respect to any of the incidents at issue in this formal EEO complaint. For this reason, Complainant cannot establish discriminatory motive as necessary, to establish Agency liability for a claim of disparate treatment or discriminatory harassment.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we AFFIRM the Agency's final order implementing the AJ's summary judgement finding of no discrimination.

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

January 29, 2024
Date