



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

[REDACTED]
Emelda F.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2023002572

Agency No. 2003-629-2022-143988

DECISION

On March 27, 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 March 16, 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 Complainant was subjected to harassment based on her race and/or reprisal for protected EEO activity.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Program Support Assistant at the Agency's VA Medical Center in New Orleans, Louisiana.

On March 14, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of race (African-American) when her first-level supervisor, the Chief of

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.

Environmental Management Service (EMS) (Chief) subjected her to numerous incidents of harassment including but not limited to, calling her “ghetto;” calling a huddle with various staff members and using “vulgar” language and threatening staff members’ jobs; detailing Complainant from EMS to the Volunteer Service Office; issuing Complainant a proposed two-day suspension; calling Complainant’s personal cell phone; and when the Housekeeping Aid Supervisor (Housekeeping Supervisor) raised her voice at Complainant in a morning meeting and told Complainant that she was “tired of her.”²

Complainant stated that her relationship with the Chief is “hostile and stressful” because the Chief “screams at the employees in a very rude and disrespectful way.” See Report of Investigation (ROI) at 176. She asserted that in April of 2017, the Chief called her into the office to have a discussion about performance appraisals and called her “ghetto” because Complainant is from New Orleans. See ROI at 177. She stated that later in January 2020, the Chief called Complainant into the office to discuss purchase card orders and criticized the Assistant Chief who was supposed to help the Chief and saying she should not have hired the Assistant Chief and when Complainant spoke up to defend the Assistant Chief, the Chief again called her “ghetto” for speaking up. See ROI at 178. Complainant stated that later, she went to speak with the Medical Center Director about her issues with the Chief calling her “ghetto,” the Chief went up to her with an “angry look” on her face and instructed her to set up a meeting with the union in a “rude way.” See ROI at 180.

The Chief denied ever calling Complainant “ghetto,” and asserted that the only incident she recalls from January 2020 is that she met with Complainant to inform her that the Assistant Chief had appeared to “leer” at Complainant’s rear end when she was leaning over a desk and that this behavior was unacceptable but Complainant stated she just wanted to ignore the behavior and did not want to file an incident report on it. See ROI at 236.

Complainant asserted that on June 2, 2020, at one of the regular staff “huddles” where they discuss issues and share other important information, the Chief “started hollering in an intimidating manner” saying things like “I’m tired of this f***ing sh***” and threatening to get rid of everyone. See ROI at 183-84. Complainant further alleged that in September 2020, the Chief stopped her in the hallway and asked her if she knew a certain employee from the street and told her to stop doing the employee’s timecard. See ROI at 184-85. The Assistant Chief confirmed that the Chief used profanity and stated that if things were not done, all the staff would have to go. See ROI at 299.

² The Agency accepted the claim of Complainant’s being detailed to the Volunteer Service Office as a discrete, independently actionable incident. See Report of Investigation (ROI) at 26-29. While Complainant did not include reprisal as a basis in her complaint, she repeatedly alleged reprisal as a basis in her affidavit.

Complainant stated that on January 13, 2022, the Chief asked her about an incident that had happened at a huddle where Complainant stated that when it was her turn to speak, she spoke about timecards and how the Housekeeping Supervisor does not do the timecards correctly and lets the staff call her on her cell phone to call off instead of on the office phone as they are supposed to do and the Housekeeping Supervisor started hollering at Complainant that she was tired of Complainant. See ROI at 186. Complainant stated that afterward, the Chief asked her if she would be willing to sit in Volunteer Service in order to separate Complainant and the Housekeeping Supervisor after the verbal altercation between the two, but that Complainant continued to do her regular duties. See ROI at 187-88. Complainant stated that she believed this was unfair because the Housekeeping Supervisor was not also moved. See ROI at 188. She further asserted that on January 26, 2022, she learned that a police report had been filed against her, stating that the Chief forced the Housekeeping Supervisor to file a report to the VA police about the incident at the huddle. See ROI at 190.

The Chief stated that she heard about the disruptive incident that occurred between Complainant and the Housekeeping Supervisor and as a manager, she needed to address the inappropriate behavior, so she spoke to both Complainant and the Housekeeping Supervisor and asked them to provide statements regarding the incident. See ROI at 242. The Chief further asserted that because of the incident, she met with Complainant and asked her if she was willing to voluntarily move to Volunteer Services and work from that location and Complainant agreed to the relocation. See ROI at 242-43. The Housekeeping Supervisor stated that Complainant became aggressive, coming from behind her desk to approach the Housekeeping Supervisor and yelling and cursing about call-in procedures for sick leave for employees so that two other employees needed to restrain Complainant. See ROI at 275. She stated that she told Complainant that she was tired of Complainant's abuse because she asserted Complainant has directed verbal abuse and disruptive behavior towards her for two years. See ROI at 286. The Housekeeping Supervisor stated that she filed a report with the VA police about the incident. See ROI at 287. A Co-worker (Co-worker 1) who was also at the meeting on January 13, 2022, explained that the Assistant Chief was discussing proper procedures for calling in requested leave when Complainant stated to the Housekeeping Supervisor "and that goes for everyone [Housekeeping Supervisor's name]" and the Housekeeping Supervisor said "I'm tired of this. Y'all need to do something about her." See ROI at 307. The Co-worker stated that both Complainant and the Housekeeping Supervisor got loud and Complainant started approaching the Housekeeping Supervisor aggressively and was restrained by two other employees. See ROI at 307.

Complainant stated that later, she talked to the EEO Counselor about wanting to move to a different department to avoid the harassment by the Chief and the Chief spoke to her in an "intimidating way" and pointed out other departments that the Chief thought would be better for Complainant to go to and when she told the EEO Counselor about the Chief's statement, the EEO Counselor made a comment to her about selecting a job soon so that she didn't have to go through with the EEO claim as there are a high number of claims filed at the facility and they want to keep the numbers down. See ROI at 191-93. The EEO Counselor denied that she made a comment to Complainant about not going through with the EEO complaint but stated that she only provided Complainant with the fact sheet on how to file a complaint. See ROI at 326.

Complainant stated that the Chief called her personal cell phone twice on April 28, 2022, and when she asked the Chief not to call her cell phone, the Chief said that she would not, but she called Complainant's cell phone again on June 6, 2022. See ROI at 196. Complainant further asserted that on June 8, 2022, the Chief sent her an email with various work-related instructions telling her to use the call log, send her a message when Complainant goes on breaks or to lunch outside the designated break times, forward the phone lines to the EMS office when she goes on breaks, and informed her that she expects Complainant to answer the phone when she calls Complainant and Complainant should call the Chief and tell her who is on the phone rather than just releasing the call to her. See ROI at 207. Complainant stated that she believes the email was in retaliation for filing the EEO complaint and filing a whistleblower complaint because she never received those instructions before. See ROI at 208.

The Chief explained that she called Complainant's personal cell phone because she was unable to reach Complainant on the office phone and it was not her lunch or break time. See ROI at 248. The Chief stated that she sent Complainant the email to reiterate her duties and expectations while she worked in a different location but still performed her usual duties and that it was to prevent the service from missing important calls while Complainant is away from her desk. See ROI at 256-57.

Complainant stated that on July 15, 2022, she was told by the Housekeeping Aide that the Housekeeping Supervisor said that Complainant was the one who charged another employee with Absent Without Leave (AWOL). See ROI at 216. She asserted that later on July 19, 2022, the employee spoke to her on the office phone and said that the Housekeeping Supervisor told the employee that Complainant changed the employee's timecard and Complainant told the employee that it was false. See ROI at 218. Complainant stated that she felt the Housekeeping Supervisor was slandering her by making false accusations because she is friends with the Chief. See ROI at 218-19. The Housekeeping Aide stated that she, the Housekeeping Supervisor, and the Assistant Chief were discussing an employee's timecard and she wanted to place an employee on AWOL and the Housekeeping Supervisor said that "nobody but [Complainant] told you to AWOL [the employee]." See ROI at 330. The Housekeeping Aide said that the Assistant Chief then corrected the Housekeeping Supervisor and said that he was the one who made that decision. See ROI at 330. The Housekeeping Aide asserted that she told Complainant about the incident because Complainant should know that "her name was being slandered." See ROI at 331. The Housekeeping Aide further stated that the Housekeeping Supervisor has issues with multiple employees because she "doesn't know how to speak to employees with respect" and "always feels that she is right about everything." See ROI at 332.

Complainant asserted that on August 3, 2022, the Chief told her to schedule a meeting with the union about a proposed action and at the meeting, the Chief gave her a document of the proposed suspension which stated that it was for a "delay in posting a timecard." See ROI at 224. The Chief stated that she issued Complainant a proposed suspension because it was her responsibility as a supervisor to correct Complainant's inappropriate behavior. See ROI at 268-69.

At the conclusion of the 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). The decision found that the Agency articulated a legitimate, nondiscriminatory reason for reassigning Complainant to the Volunteer Services office and Complainant did not establish that the Agency's reasons were a pretext. The decision also found that the evidence in the record did not support that some of the alleged incidents of harassment occurred as alleged but that, in any event, there was no evidence in the record beyond Complainant's subjective beliefs to indicate that any of the alleged incidents were due to either Complainant's race or reprisal. The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

Complainant appealed. Neither Complainant nor the Agency filed a brief on appeal.

ANALYSIS AND FINDINGS

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”).

Disparate Treatment

Applying the McDonnell Douglas burden-shifting standard defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a complainant initially must establish a *prima facie* case of discrimination by presenting facts which, 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 St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507 (1993); Texas Dep’t of Community Affs. v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas 411 U.S. at 802. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Burdine, 450 U.S. at 253. Once the agency has met its burden, the complainant has the responsibility to demonstrate by a preponderance of the evidence that the agency’s action was based on prohibited considerations of discrimination, that is, its articulated reason for its action was not its true reason but a sham or pretext for discrimination. See Hicks, 509 U.S. at 511; Burdine, 450 U.S. at 252-53; McDonnell Douglas, 411 U.S. at 804.

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a *prima facie* case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for its actions, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983).

Here, we find that the Agency articulated legitimate, nondiscriminatory reasons for its actions. Both Complainant and the Chief explained that Complainant was not officially reassigned to Volunteer Services but rather that the Chief asked Complainant if she would be willing to relocate and work out of the Volunteer Services office while still performing her usual duties in order to separate Complainant from the Housekeeping Supervisor after Complainant and the Housekeeping Supervisor had a verbal altercation. See ROI at 187-88; 242-43. Complainant stated that she was issued the proposed suspension for a delay in processing a timecard. See ROI at 224.

We find that Complainant has not established that the Agency's reasons are a pretext for discrimination. Complainant's only argument is essentially that she disagrees with the Agency's reason for moving her to the Volunteer Services office when the Housekeeping Supervisor was not also moved. She also does not dispute that she committed the inappropriate act of delaying processing a timecard; she only appears to argue that the suspension should have been issued earlier because the timecard delay occurred in March and the suspension was not issued until August. However, mere disagreement with the Agency's actions is not sufficient to establish pretext. See Ambrose M. v. Dep't of the Air Force, EEOC Appeal No. 0120180225 (June 11, 2019). There is no evidence in the record to support Complainant's assertions of discriminatory animus and the Commission has repeatedly stated that mere assertions or conjecture that an agency's explanation is a pretext for intentional discrimination is insufficient because subjective belief, however genuine, does not constitute evidence of pretext.³ See Juliet B. v. U.S. Postal Serv., EEOC Appeal No. 0120182519 (Oct. 8, 2019); Richardson v. Dep't of Agriculture, EEOC Petition No. 03A40016 (Dec. 11, 2003).

Hostile Work Environment

To establish a claim of hostile work environment harassment, Complainant must show that: (1) she is a member of a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and

³ We also note that to the extent Complainant is alleging whistleblower retaliation, such a claim is not within the Commission's jurisdiction. See Wiser v. U.S. Postal Serv., EEOC Appeal No. 0120122485 (Oct. 19, 2012).

(5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); see also Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001); Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998).

We find that the evidence does not establish that Complainant was subjected to unlawful harassment. While the record is replete with evidence that Complainant had a highly contentious interpersonal relationship with the Chief and the Housekeeping Supervisor, the evidence in the record does not indicate that the issues between them were due to either Complainant's race or her protected activity. While the Chief calling Complainant "ghetto," assuming it occurred as Complainant alleged, may have been inappropriate, that alone is simply not sufficient to infer that the Chief's treatment of Complainant was due to Complainant's race, especially considering that both Complainant and the Chief, as well as the Housekeeping Supervisor, are members of the same race. See ROI at 176; 274. Moreover, in the huddle at which the Chief yelled profanities and threatened the jobs of the staff members, while the Chief's language and manner was inappropriate, Complainant herself acknowledged that the Chief's invective was not directed at Complainant personally but rather was generally directed at all the employees.

The Housekeeping Supervisor stated that Complainant has always treated her in a hostile manner while the Housekeeping Aide stated that the Housekeeping Supervisor has issues with many employees and treats them all disrespectfully.⁴ See ROI at 286-87; 332. Finally, we find that while the evidence in the record indicates that the general work environment in the EMS was dysfunctional with contentious relationships, we find that even taken together, all the alleged incidents of harassment are not sufficiently severe or pervasive to constitute unlawful harassment. The Commission has repeatedly stated that common workplace tribulations such as contentious interpersonal relationships with coworkers and routine work assignments, instructions, and admonishments do not rise to the level of an unlawful hostile work environment. See Arthur J. v. Social Sec'y Admin., EEOC Appeal No. 0120142985 (Feb. 28, 2017). To the extent that Complainant insists she has been subjected to harassment because the Chief's manner towards her has been disrespectful and hostile, her subjective perception of the Chief's treatment is not sufficient to satisfy the objective standard required to establish unlawful harassment. See Carl T. v. Social Security Admin., EEOC Appeal No. 2022000277 (Jan. 5, 2023) (stating Title VII is not a civility code and forbids only behavior so objectively offensive as to alter the conditions of the victim's employment); Complainant v. Dep't of the Army, EEOC Appeal No. 0120111859 (Nov. 14, 2014) (a supervisor's unprofessional, vulgar, and rude language which included the use of the word "bitches" not sufficiently severe or pervasive to constitute a hostile work environment).

⁴ We also note that the Co-worker 1 who witnessed the altercation between Complainant and the Housekeeping Supervisor agreed with the Housekeeping Supervisor that Complainant herself acted as the aggressor. See ROI at 275; 307.

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 that Complainant did not establish that she was subjected to 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

January 31, 2024

Date