



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

[REDACTED]
Huong A.,¹
Complainant,

v.

Douglas A. Collins,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023002867

Hearing No. 550-2022-00104X

Agency No. 200P-0648-2021102918

DECISION

On April 13, 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 14, 2023, final order 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

During the relevant time, Complainant worked as a Medical Supply Technician, GS 6, at the Agency's Sterile Processing Unit in Portland Medical Center in Portland, Oregon.

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.

Complainant first began working with the Agency as a contractor in March 2019. Later, Complainant was hired by the Agency in January 2020 and resigned from employment with the Agency on March 23, 2021.

On June 24, 2021, Complainant filed a formal complaint alleging that the Agency subjected her to a hostile work environment and discriminated against her on the bases of sex (female) and disability (mental)², between March 2019 and March 23, 2021 (resignation date) when:³

- a) Since March 2019, Complainant was accused of having improper relationships with two male co-workers;
- b) Since December 2019, management took no action concerning co-workers spreading rumors and mocking Complainant;
- c) In March 2020, Supervisor One asked Complainant to sign a document with false information concerning her work conduct;
- d) On or about November 25, 2020, Complainant was told that "calling in FMLA kills people," or words to that effect;
- e) On an unspecified date, Complainant was told that she was going to be reported derelict if she left work under FMLA, or words to that effect;
- f) On unspecified dates, Complainant's disability was discussed in the workplace; and,
- g) On unspecified dates, Complainant was threatened with termination, and the matter included the following discrete acts:
 1. Since June 2019, management officials disclosed Complainant's personal medical information to co-workers;

² Complainant suffered a workplace injury around February 2021, which is unrelated to the claim at issue, and part of her "pinky" finger was amputated as a result of the injury. In the instant complaint, Complainant specified she identified her disability as "depression and PTSD [post-traumatic stress syndrome]" or mental disability, not a physical disability related to the finger injury.

³ For consistency between the record, appeal documents and Commission's decision, Complainant's claims are enumerated in the same format as the AJ's Decision.

2. On December 30, 2019, Complainant was not selected for the position of Lead Medical Supply Technician;
3. Since April 23, 2020, Supervisor Two did not engage Complainant in the interactive process and denied Complainant's accommodation request to change her tour of duty;
4. On January 29, 2021, Complainant was forced to change her tour of duty; and,
5. On March 23, 2021, Complainant resigned.

Complainant alleges that she has depression and PTSD as disabilities which were the direct result of an investigation conducted into a complaint made against her in March-April 2019. Complainant alleges management failed to stop rumors being spread around the workplace about her but Complainant did not allege or provide any evidence she informed management of the rumors. Multiple management officials denied hearing rumors but stated, had they heard them, an investigation would have been initiated.

Complainant alleges that she was asked by Supervisor to sign a document with false information, yet she fails to identify the specific document, there is no evidence of it in the record, and Complainant did not clarify how the false information was connected to discriminatory animus. The record seems to show a proposed admonishment in June 2020 by Supervisor that Complainant be admonished for failing in March 2020 to comply with leave procedures and being AWOL. It is unclear from the record whether Complainant was ever officially given an official admonishment.

On November 25, 2020, Complainant advised her Lead Medical Supply Technician (LMS) that she was leaving work early and would be using FMLA leave. Complainant alleges LMS responded by saying "calling in FMLA kills people". LMS denied making this statement and stated he had no knowledge of Complainant having a disability. LMS confirmed Complainant advised she was leaving on that unspecified date; however she never said what leave category she was taking, nor did she say she was even leaving the facility. LMS stated he told Complainant she cannot just abandon her work area, to which Complainant yelled in reply that she had FMLA. LMS stated this was the first time he learned Complainant had FMLA leave or was FMLA eligible.

On another unspecified date, Complainant alleges that her disability was discussed in the workplace.

She alleges she told one of the management officials of an impending amputation procedure, and later that day, a co-worker knew of the upcoming amputation. Complainant does not allege hearing Agency officials discuss her medical information. The record revealed management and the co-worker did not discuss Complainant's medical condition. Rather, a co-worker heard Complainant telling one of the management officials of the amputation procedure because Complainant was on speakerphone and the office walls were thin, allowing co-worker to inadvertently overhear.

Complainant did not submit any medical documentation or allege she submitted any evidence to support her claim that she has a disability. Three responsible management officials stated they were unaware that the Complainant had any disability other than that Complainant had a workplace injury to her elbow and/or had a pinky finger amputated. All management and Agency employees stated they were unaware of a mental disability of Complainant. During the investigation when asked why sex was a motivating factor for the Agency's alleged actions, Complainant stated the Agency intended to "to intimidate me because I am a woman". Additionally, Complainant believes the Agency's actions were motivated by her disability "because of the trauma that I endured during the investigation".

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). Complainant requested a hearing and, after discovery, on February 17, 2023, the Agency filed Motion for Summary Judgment. The Complainant filed her timely Response followed thereafter by the Agency's Reply.

Over Complainant's objections, the assigned AJ granted the Agency's February 17, 2023, motion for a decision without a hearing and issued a decision without a hearing finding no discrimination on March 14, 2023. In the decision, the AJ while adopting and incorporating the Agency's motion therein, also explained based on the AJ's own review of the record how Complainant failed to make a prima facie case of discrimination or harassment. The AJ pointed out Complainant never submitted any medical records or anything besides her statement that she suffered from mental disability and never submitted a reasonable accommodation request. Instead, she only sought leave under the FMLA.

On March 17, 2023, the Agency issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. Complainant, through her attorney, filed the instant appeal.

On appeal, Complainant reiterates her arguments in her response to summary judgment before the AJ. The Agency filed an opposition, seeking this Commission uphold the findings by the AJ.

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*. 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*).

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.

The record establishes that Complainant despite Complainant's claim she suffers from PTSD and depression, Complainant has failed to ever submit any medical documentation to support a finding that she is a qualified individual with a disability. Complainant does not allege she submitted documentation of a disability. A review of the record revealed Complainant never submitted a request for reasonable accommodation. Additionally, as the AJ noted, there is no evidence to support that any of the Complainant's leave requests during her employment were based upon her alleged depression or PTSD.

Even if Complainant had established a prima facie case of disability and/or sex discrimination, she has failed to rebut as a pretext for discrimination the Agency's non-discriminatory explanations to her claims. Regarding Claims A and B, the Agency took immediate action upon being notified of the alleged improper sexual activities. Management officials stated they were unaware of such rumors and Supervisor stated as soon as she was informed, she launched an inquiry. In Claim C, Complainant alleges that she was asked by Supervisor to sign a document with false information, yet she fails to identify the specific document and there is no evidence of it in the record. Moreover, there is no allegation of why such proposed admonishment is connected to her protected status. The documentation in the record shows in June 2020 Supervisor proposed that Complainant be admonished for failing in March 2020 to comply with leave procedures and being AWOL, which are not related to her protected status.

Regarding Complainant's Claim D and E, management noted that even if the comments were true, co-worker's alleged comments are no more than a stray remarks by a co-worker with no authority over the Complainant's FMLA entitlement and Complainant suffered no adverse employment action. Anti-discrimination statutes are not general civility codes designed to protect against the "ordinary tribulations" of the workplace. See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); see also Lassiter v. Dep't of the Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012) (personality conflicts, general workplace disputes, trivial slights and petty annoyances between an alleged harasser and a complainant do not rise to the level of harassment). Instead, EEO laws address discriminatory conduct that alters the work environment. See Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998).

The matters raised in Claims F, G and Event 1 were unsubstantiated in the record. There is no evidence in the record suggesting that anyone other than the Complainant discussed her alleged disability, discussed possible termination, or otherwise confidential medical information inappropriately. Likewise, regarding Claims G and events 3 and 4, there is no evidence that the Complainant's tour of duty was changed for other than work-related reasons with appropriate consideration of her workplace medical restrictions and her seniority. Moreover, as to her resignation in Event 5, Complainant stated in the record she resigned due to inability to both meet her workers' compensation guidelines (from her finger injury) and provide for her children/not alter her custody agreement.

With regard to her non-selection, Complainant offered no evidence beyond her self-serving beliefs to support her 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. See Jed T. v. Dep't of Homeland Sec'y, EEOC Appeal No. 2022000805 (May 18, 2023); Juliet B. v. U.S. Postal Serv., EEOC Appeal No. 0120182519 (Oct. 8, 2019). Moreover, an agency has broad discretion to set policies and carry out personnel decisions and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 259 (1981); Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan 16, 1997). Not only did Complainant fail to allege any evidence that she was plainly superior to the selectee, but she stated she had "the worst interview of [her] entire life." Merely stating the selection process is a "good ol' boys club" is insufficient in itself to show her selection was based on discriminatory animus. Accordingly, the Commission concurs with the AJ's ultimate finding that Complainant did not establish that her non-selection was based on her sex or disability.

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 to Complainant's overarching claim of hostile work environment, we have addressed each claim herein, as the AJ did, and found no basis for discriminatory animus in any of the claims as Complainant alleged. We find Complainant fails to establish a viable claim of hostile work environment. Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency or subjected to a hostile work environment as alleged.

Accordingly, we AFFIRM the Agency's final order implementing 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